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In the Supreme Court of the United States.

OCTOBER TERM, 1897.

KANSAS CITY LIVE STOCK EXCHANGE,
(*Sub nom.*, HENRY HOPKINS, et al,)
Appellants,

v.

UNITED STATES,
Appellee.

STATEMENT OF CASE, BRIEF, AND ARGUMENT FOR THE APPELLANTS.

STATEMENT OF CASE.

This is a proceeding instituted in the Circuit Court of the United States for the District of Kansas by way of a bill in equity in the name of the United States against the members of the Kansas City Live Stock Exchange, based upon the Act of Congress, approved July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies." (26 Stat. L., 209).

In order to facilitate the consideration of this presentation of the case, a Table of Contents has been prefixed thereto.

THE BILL OF COMPLAINT.

The bill (Record, 2–13) contains, substantially, the following allegations:

The defendants, about 300 in number, are members of a voluntary, unincorporated association known as the Kansas City Live Stock Exchange, and have adopted certain by-laws and rules which they have agreed to observe and to be bound by; thereby the government of said Exchange is vested in a board of directors and certain officers, who carry on the said Exchange at the Kansas City Stock Yards, with the consent of the members thereof. Said Stock Yards are situate partly in Missouri and partly in Kansas, the State line running through the same, and about one-half of said defendants have their offices in each of said States.

The Kansas City Stock Yards Company, a corporation, (but not sued), is the owner of said yards and buildings used in connection therewith, which are situate partly in each of said States.

Substantially all the business of receiving, buying, selling and handling live stock at said Kansas City is carried on by the defendants and their fellow-members of said Exchange, acting as commission merchants. Such live-stock is shipped to said yards from Kansas, Nebraska, and other States, and from Oklahoma and other territories, and sold by said commission merchants to the managers of various packing-houses situate in the two Kansas Cities, or for shipment to various other markets, particularly Chicago, St. Louis, and New York. A "vast" quantity of live-stock is annually thus received, handled and sold. Kansas City is a public market and supplies said packing houses and others elsewhere in the Union. Second to Chicago, Kansas City is the largest live-stock market in the world. Under the custom long prevailing there, live-stock is delivered to members of said Exchange for sale and

re-shipment, on behalf of the consignors and owners, "charging them a commission for their services."

In the course of business at said yards, such live-stock is moved and shifted from that part of the yards in Missouri to that part thereof in Kansas, and *vice versa*, according to the convenience of said Stock Yards Company; and in making re-shipments, pens and loading chutes in both States are used.

Much of the live-stock shipped to said stock yards is encumbered by mortgages executed by residents of the States and Territories mentioned, to persons who are members of said Exchange, it being the custom of such members to advance large sums of money to the owners of live-stock, to enable them to feed and prepare the same for market. Such mortgaged live-stock is shipped to the mortgagees, who collect their claim out of the proceeds of the sale thereof. Ninety per cent of such members make these advancements "and a large and growing market for live-stock at Kansas City is largely sustained by means of the money so advanced."

Said stock yards furnish the only available means for handling, selling, and re-shipping live-stock within 200 miles to the north, south, and east of said city, and for 2,000 miles to the west thereof. By reason thereof, said stock yards is the only available public market for the purchase and sale of live stock in said States and Territories and the only available means for the exchange of interstate traffic in said live stock between the States and Territories named. It is the daily custom of commission merchants to make sales in Missouri of live stock which is at the time located in the pens in Kansas, and *vice versa*, and deliveries are made from pens in one of said States to purchaser in the other.

All the commission merchants at said yards are members of said Exchange.

It is the custom of consignors of live-stock in one State to draw drafts on the commission merchants to

whom the same is consigned, residing in another State, attaching the bill of lading thereto, to obtain money on said draft from local banks, and for the drawees thereof to pay the same in Missouri and Kansas.

Because business at said yards is transacted on both sides of said State line, and because live-stock received at said yards is transported from one State to another, and in the course of the receipt, sale, delivery, and reshipment thereof is at times in Kansas and at other times in Missouri, the said business is interstate in character, and not subject to the laws of Missouri and Kansas in reference thereto, but can only be regulated by Federal legislation, "because it is a part of the commerce between the States." Said yards are also patronized by persons who purchase live-stock thereat for reshipment to Eastern States and for foreign export, having resident agents to make such purchases. The live-stock, when so purchased, is loaded into railroad cars to be carried to Chicago, St. Louis,New York, and other Eastern markets. Large shipments are made to said yards by owners from various States for the purpose of being sold and having the proceeds remitted to such owners.

If the consignee of live-stock is not a member of said Exchange, he is not permitted and cannot sell or dispose of the same at said yards, for the reason that such members, as required by the rules of said organization, refuse to buy live-stock from, or to negotiate or deal with, a person or commission merchant who is not such a member. In all such cases the owner of live-stock is compelled to reship the same to some other market, by reason of the unlawful combination among said merchants, and consequently the sale thereof is hindered and delayed, extra expense and loss entailed upon the shipper, and an obstruction and embargo placed on the marketing of all live-stock shipped to said market, unless it is consigned to said Stock Yards Company or to some member of said Exchange, "who alone

are permitted by said Stock Yards Company to transact business at its stock yards." (As to this, see *note a*, *post.*)

The members of said Exchange have adopted and are governed by certain articles, by-laws and rules, many of which are in restraint of trade and commerce between the States and intended to create a monopoly, in contravention of the laws of the United States.

Among said rules are two, numbered IX. and XVI., respectively, a summary of which is given at a subsequent page, in connection with the other rules of the Exchange.

All of the members, it is charged, have agreed to be bound by, and to conform to Rule IX, and within three months prior to December 31, 1896, members have been suspended for a violation of Rule IX. (see Greer *v.* Stoller, 77 Fed. Rep. 1, for the instance referred to), and at various times jurisdiction has been exercised over complaints against other members for like violations.

By the adoption of these rules, and by associating themselves to carry the same into effect, and by conducting business as alleged, the members of said Exchange have conspired and confederated together in violation of the laws of the United States, and particularly of the Act of July 2, 1890, and in the prosecution thereof, have agreed: (*a*), to monopolize the business of buying and selling cattle at said market; (*b*), to illegally fix and establish a minimum price for their services; (*c*), and to prevent and restrain the free transmission of information regarding the state of the market, by telegraphic messages, and other information to the various States and Territories mentioned; and,(*d*),have restricted the free employment of agents and solicitors in the prosecution of their business as commission merchants.

The purpose of said Exchange is to prevent the shipment and consignment of live stock to said market unless shipped or consigned to the Kansas City Stock

Yards Company, or to some member of said Exchange, and by preventing such shipment or consignment to persons other than themselves, to compel shippers to pay the commissions fixed by said Rule IX., and to prevent shippers from placing their property on sale in said yards without paying such commissions to some member of the Exchange.

It was the purpose of such members to monopolize the business of receiving, handling, selling, buying, and re-shipping live stock at said market; to prevent a sale thereat by any non-member; to prevent any non-member from acting as a commission merchant at said market; and to obstruct and retard the owners of live-stock in the sale and disposition of their property in said market.

The bill concludes with prayers,

1. That the Exchange be dissolved;
2. That the members thereof be enjoined from:

a. Entering into or continuing in any sort of combination to deprive the people engaged in shipping, selling, buying, and handling live-stock, of the enjoyment of free access to said market and of the facilities afforded by said stock yards, upon payment to said Stock Yards Company of the same charges now paid by members of said Exchange;

b. From enforcing, acting under, or yielding obedience to said Rule IX., and from imposing or attempting to impose any of the penalties therein provided;

c. From discriminating against any person not a member of said Exchange solely because of such non-membership;

d. From refusing, by united or concerted action, to deal with persons who are not members, solely because of such non-membership;

e. From entering into a contract, combination, or conspiracy, fixing or tending to fix, directly or indirectly, the rate of commissions to be charged for buying

or selling live stock shipped from one State or Territory for sale or disposition in another; and

f. From entering into any contract, combination or conspiracy limiting, or attempting to limit, the right of any person engaged in business at said stock yards, to employ labor or assistance, or to send telegrams, prepaid or not, as he may desire; and

3. For general relief.

The bill was verified, as on absolute knowledge, by Norman B. Greer, on December 23, 1896, and was filed December 31, 1896. (Record, 13, 14).

Note *a.* Counsel *whose names are signed to the bill* are entitled to be relieved from any imputation because of the presence of the allegation that *members of the Exchange* "*alone are permitted by said Stock Yards Company to transact business at its stock yards*," having, doubtless, not been informed as to the true situation. In so far as this paragraph implies that an owner of live stock cannot bring his cattle to such yards and sell them to any person whatsoever, members of the Exchange included, the allegation is *wholly untrue.* If a commission merchant is employed who is not a member of the Exchange, he cannot avail himself of the privileges of membership therein, and members are prohibited from dealing with him as a commission merchant, if he violates the rules or has been suspended or expelled. (Rule XVI.) The allegation that the Stock Yards Company permits no one but members of the Exchange to transact business at its stock yards, is so palpably and notoriously false, that its appearance in this bill is surprising; the more so, because *the party who verified the pleading as absolutely true*, was, at the time he made that oath, advertising in the public prints that his own firm was engaged in business at said yards as a rival and competitor of the members of said Exchange, and soliciting consignments as such, and has made an affidavit in this case that the "Kansas City Stock Yards Company (is) *in nowise connected* with the

Kansas City Live Stock Exchange," except only that said stock yards company owns the building in which all of the commission men have offices (Record, 148, 180). Such is also the situation at Chicago (Stock Yards Co. v. Mallory, etc. Co., 157 Ill., 554, 562).

It also appears that nearly, if not quite, as many persons are engaged in the business of buying and selling live-stock at said stock yards (but not as commission merchants), without being members of the Exchange, as there are members of that body. In a legal sense, as shown in the brief, the allegations are, however, immaterial.

In order that the very important matters involved herein might be fairly presented and fully considered, the defendants filed an answer and also certain affidavits challenging such allegations of the bill as are generally and notoriously known to be utrue; presenting the rules of the defending Exchange in full; and explaining the precise facts as to certain matters relative to which the allegations of the bill are vague, obscure, misleading, or so unduly exaggerated as to convey the suggestion of unfairness or untruthfulness.

THE ANSWER.

The answer of the defendants (Record, 163–173,) sets up the following facts:

It has long since been and is now the uniform custom and practice, whenever a given city or point is inclined to become a trade center or market for given property or commodities, that the formation of an Exchange or Board of Trade is both proper and necessary in order to further the tendency to make such trade

center, to build up the same, and to maintain it when once established. By the common practice of mankind and in response to demands of business interests, such Exchanges or Boards of Trade are established and maintained by the persons engaged in the branch of business under consideration, or interested in the development thereof. In some instances, the organizations are formed by persons engaged in buying and selling a given product or commodity as principals, but in most of the instances such bodies are organized and maintained by parties who sell and buy a given product or commodity for others upon a commission, and known either as brokers or commission merchants.

Such organizations exist in practically every city of importance in the United States, and are devoted respectively to bonds and stocks, grain, cotton, and other agricultural products, live stock, petroleum, and other mineral products, and generally to all kinds and species of property which are bought and sold by persons acting for a commission or brokerage.

All of these organizations are framed upon the same model, and the provisions of their several charters, constitutions, rules and by-laws embody these features: membership is wholly at the will of the associates, and is granted subject to the conditions prescribed by the rules of the body in question, and continues only so long as those conditions are complied with; the privileges of membership are available only to members, and all others are excluded from such privileges and from the right to deal with such members; members are subject to discipline for dishonorable conduct, failure to keep their business engagements, and for other similar acts on their part; a schedule or tariff of the rates of commission or brokerage fees to be charged by the members in their dealings is prescribed, and all evasions thereof prohibited; actions or proceedings which the course of trade has demonstrated to have a tendency to cause stealthy and unfair or ruinous

warfare between members are provided against; members are prohibited from dealing with persons violating the rules of the body, or who have been suspended or expelled therefrom; and, generally, such provisions are made which, in the opinion of the business associates, based upon and sanctioned by the experience of the commercial world, do and will have the effect to inspire public confidence in the dealings of the associates, in the machinery provided for punishing dishonorable actions and for enforcing compliance with business engagements; well-known and reasonable rates of compensation to be charged by the members are prescribed, and in order that competition between the members may be fair and honorable, and that the same treatment may be accorded to all employers, evasions of such rules may be punished.

Such organizations do not engage in business, but exist simply in order to prescribe rules and provide facilities for the transaction of business by the members thereof, and to govern them by such rules and regulations as have been evolved and sanctioned by the developments of commerce, and which are universally recognized to be just and fair to all concerned.

Each member of said organization is left, and is, in fact, free to compete, in every manner and by all means recognized to be fair and just, for his share of a business which comes to the point at which the members of the organization do business.

After similar Live Stock Exchanges had been formed at Chicago, and East St. Louis, Illinois, and the great benefits to the public and to the persons interested in that business at said cities had been developed, the commission merchants engaged in selling and buying live stock at Kansas City, in 1886, formed the Kansas City Live Stock Exchange, following in their rules, regulations and schedule of commissions, in all substantial respects, the provisions which had been made upon the same subjects respectively by the Exchanges

theretofore established at Chicago and East St. Louis, Illinois, as aforesaid; and, that since the establishment of said Live Stock Exchange at Kansas City, similar Exchanges have been established at St. Louis, Mo., Omaha, Indianapolis, Buffalo, Sioux City, and Fort Worth, and that at several points provisions of the same general nature have been made the subject of an agreement between the parties engaged in the business of selling live stock for commission without the formal organization of an Exchange. The defendants herein either participated in the organization of said Exchange, or have since become members thereof, and have agreed, one with the other, to faithfully observe the articles of association, rules and by-laws thereof.

The officers provided by said agreement, have been elected and charged with the duty of enforcing said rules, but it is not true that said Exchange is engaged in any business at any point whatsoever, such business being done by the members thereof, each on his own account and to his own profit, or at his own loss, as the case may be. The business of said members is principally done at the Kansas City Stock Yards. Most of said members are engaged in selling, and sometimes in purchasing, live stock for a commission, and acting for others.

There are also a number of members who are engaged in managing and operating packing-houses and other enterprises, who are deeply concerned in building up and maintaining the high standing of Kansas City as a point to which live stock may be shipped for sale, or at which live stock may be bought under rules and regulations insuring honesty and fidelity, and under uniform and reasonable rules and at uniform and reasonable rates of commission, and that such facilities shall be maintained for conducting the sale and purchase of live stock, that persons desiring to sell or buy the same will find it to their interest to do so. Accordingly, the persons, last described, and others interested,

are also members of such Exchange, and each and every member thereof either voluntarily joined in originally establishing the same, or has since become a member thereof, and that at no time has said Exchange refused to admit as such member any reputable person who was willing to comply with the conditions of membership, and to abide by the rules of said organization.

It is true that, by reason of the high standing of the members of the Exchange individually, the guaranties afforded by the rules to which they have subscribed, the merit of the regulations for doing business which they have established, the reasonableness of the rates of commission which are charged, and the assurance that said rules will be promptly and efficiently enforced, and the usefulness and benefits of the facilities which have been provided, induce the greater part of the live stock, which is shipped to the Kansas City Stock Yards to be consigned to some commission merchant who is a member of said Exchange, to be sold by him for and on account of the owner thereof; and it is also true that, for the same reasons, the persons desiring to buy live stock at said stock yards, whether members of said Exchange or not, prefer to purchase from or by means of members of such Exchange, and thereby to secure the benefits and guaranties of the rules and regulations of said organization; and it is also true that the persons connected with said packing-houses, and other enterprises, desirous of buying cattle, who have become members of said Exchange have thereby agreed to observe the provisions of Rule XVI. of said Exchange, in their dealings.

But it is not true that thereby, and through such members, substantially, all of the business of buying and selling live stock at Kansas City is carried on. On the contrary, persons owning live stock and desiring to sell the same at said city are under no obligation whatever to employ a commission merchant or to employ a mem-

ber of said Exchange, but are at full liberty to act for themselves in making such sales, and said Kansas City Stock Yards Company extends to such persons all the privileges and facilities afforded by said company. So, too, any person desiring to purchase live stock at said city, or employed to make any such purchase, may, and they constantly do, deal with and buy from the owners direct, and any person who desires to buy cattle at said stock yards, although not a member of said Exchange,is at perfect liberty to purchase the same from any person whatsoever, and very much the larger part of the cattle purchased for the purpose of being fed and improved in condition are purchased without the intermediation or employment of any commission merchant whatever.

It is true, also, that a very large number of persons do business at said stock yards who are generally known as yard-traders, and who buy and sell on their own account, who are not members of said Exchange, and with whom said members deal not only freely, but cheerfully.

The only restriction upon members of the Exchange is that contained in Rule XVI., to-wit: that they will not deal with a person as commission merchant who violates the rules of said Exchange, or is a suspended or expelled member thereof.

Said commission merchants are in no wise concerned in the business of said Kansas City Stock Yards Company. Said company has sole charge of its yards and appliances, the only connection of members of said Exchange with said matters and said live stock being to execute the commissions entrusted to them, and to see that the interests of their employers are faithfully and conscientiously protected and furthered.

While it is true that very largely by the efforts of these defendants, the high character of said Exchange, the public confidence in the integrity of its members and the fairness and validity of its rules and regulations,

and the excellent character of the facilities provided by said organization, Kansas City is ranked next to Chicago as a point at which more live stock is handled than at any other point in the world, these defendants are informed by counsel, and believe, that said stock yards do not constitute a public market, but are of merely a private character. The live stock coming to said stock yards is placed in proper pens provided by said Stock Yards Company, and are therein yarded until a sale is negotiated, and the commission merchant selling the same has no control or direction as to the subsequent shipment, re-shipment, removal, or other subsequent disposition of said live stock.

It is not true that said stock yards afford the only available means or place in the territory mentioned in the bill of complaint, for the sale, purchase and exchange of live stock, but, on the contrary, much the greater portion of the live stock sold and purchased in said territory is by means of negotiations and transactions at points other than said stock yards, and without the interposition of any member of said Exchange; and it is only when any owner of live stock desires to ship his cattle to said yards, or an intending purchaser desires to purchase at said yards, that the facilities thereof are utilized.

With the exception of the firm of Greer, Mills & Company, which was first suspended from membership in the Exchange for non-payment of a fine imposed for a violation of the rules thereof, and which subsequently voluntarily withdrew from said Exchange, all of the commission merchants exercising their occupation at said Kansas City Stock Yards are members of said Exchange.

It is not true that a consignee of live stock is not permitted to sell or dispose of the same at said Kansas City Stock Yards, or that the members of such Exchange refuse to buy, negotiate or deal with a non-member thereof. On the contrary, as heretofore stated,

unless the person so offering said live stock for sale, is a non-member *commission merchant* violating the rules of said body, or one who has been suspended or expelled therefrom, said members will deal with any person whatsoever, not only freely, but cheerfully.

It is not true that an owner of live stock shipped to said stock yards, and refusing to employ a member of said Exchange, is compelled to re-ship the same to some other market; nor, indeed, is it true that if such owner should consign live stock to a commission merchant who was a non-member or a suspended or expelled member of said Exchange, that such re-shipment would become necessary, but such non-member commission merchant can sell the same either to a person not a member of such Exchange or willing to deal with such non-member commission merchant, or if such non-member commission merchant desires that a sale shall be made under the rules of said Exchange, any member of said Exchange will cheerfully serve him according to such rules.

The defendants say that there is no unlawful combination among them, or the members of such Exchange, nor is it true that any person is prevented from delivering live stock to the Kansas City Stock Yards, or that the sale of live stock is either hindered or delayed, or that any extra expense or loss to the shipper is entailed, or that any obstruction or embargo on the marketing of live stock shipped from any State or Territory whatsoever to said stock yards, is placed or created.

It is absolutely untrue that the Kansas City Stock Yards Company permits members of said Exchange alone to transact business at its stock yards. On the contrary, said Stock Yards Company permits any person whatsoever to transact business at its yards, who will pay the established charges of that company for its services in the premises, and, in point of fact, a very large part of the business done at said yards is trans-

acted by persons who are not members of said Exchange, and without the interposition of such member. There are more than one hundred persons engaged in buying and selling for themselves and on their own account, who have their offices and places of business at said yards, and who are not members of said Exchange, and with whom the members of said Exchange, as above stated, constantly deal, selling to and buying from them whenever the interests of their clients are served thereby.

It is the first aim and purpose of said members to serve their principals and to protect and advance their interests; but they submit that they are under no obligations to extend the privileges of said Exchange to a person who is a non-member thereof, who has violated its rules and been suspended from membership, and who has voluntarily withdrawn therefrom and announced his purpose to carry on his business as a competitor of the members of such Exchange, to the destruction of said organization and its rules, and to the injury of his competitors; and the defendants further submit that they cannot be compelled to deal with a non-member of their organization, or a person violating its rules, or who has been suspended for such violation, or who has withdrawn therefrom, or who has announced his intention to destroy said organization and to compete with the members thereof, nor, indeed, that said defendants can be compelled to deal with any person whatsoever, and they further submit that they had a right to establish said Exchange and now have a right to maintain the same, to agree to and observe the articles, rules and regulations hereinbefore set out, and to require an observance thereof on the part of their associates so long as they desire to retain the privileges of membership in said body.

They deny that any of said rules or by-laws are in restraint of trade or commerce between the States or otherwise, or that they were or are intended to create a

monopoly in contravention of the laws of the United States, or in any other way whatsoever. On the contrary, they charge that each and every one of said rules is in all respects legal and binding, and in harmony with the rules and regulations of Commercial Exchanges, which have existed for more than one hundred years, and which are now to be found in every city of importance in the United States and throughout the world.

It is true that all the members of said Exchange have agreed to be bound by and conform to the provisions of Rule IX., set out in the bill of complaint, in the sense that by violating the same they subject themselves to the penalties therein provided, and, in default of payment of a fine properly imposed for such violation, to suspension or expulsion from said organization, but they are free, at any time, to surrender their membership and to voluntarily withdraw from said body. The Board of Directors of said Exchange have not only enforced said Rule IX. against members of said Exchange, but have likewise enforced, in the manner therein provided, the other rules of said body, and on the whole, more members have been disciplined for violating other rules than for violations of said Rule IX.

The defendants deny that by the adoption of said articles of association, rules and by-laws, or by associating themselves together in said association known as the Kansas City Live Stock Exchange, or in carrying out the said articles, rules, and by-laws, or by the manner of conducting their occupation as commission merchants, or otherwise, they have conspired or confederated together in violation of any law of the United States whatsoever, or that they have agreed or confederated together to monopolize the business of buying and selling live stock at said Kansas City Stock Yards, or to illegally fix and establish a minimum price for buying and selling such live stock, or that they have,

in restraint of trade or commerce between the States, or otherwise, confederated together to prevent or restrain the free transmission of information respecting the state of the market of said Kansas City by telegraphic message or information to the various States or Territories mentioned in said bill of complaint, or any one of them, or that by the adoption or enforcement of said Rule IX. they, or either of them, have restricted the free employment of agents or solicitors in the prosecution of the occupation in which said defendants are engaged as live stock commission merchants, or otherwise.

The defendants say that the rates of commission established by them are the same as those which prevail in other cities where live stock is sold through the interposition of live stock commission merchants, and that the same are fair and reasonable, and refer wholly to compensation to be made for personal services to be rendered by the associates in the exercise of their occupation as commission merchants; that the provisions of said Rule IX., in reference to sending prepaid telegrams reporting the state of the market, other than reports to persons who have consigned live stock to said Exchange for sale, or who are desirous of purchasing live stock at said stock yards, and the provisions relative to the matter of solicitors to be employed by members of said Exchange, are not only proper and reasonable, but long experience has shown that such rules are necessary in order to prevent stealthy and unfair warfare between the members, and for the protection of the members from ruinous expenditures, and for the fair, proper and honorable conduct of said occupation.

The defendants say that the purposes of the organization of said Exchange and the adoption and enforcement of its rules and by-laws have hereinbefore been correctly set forth, and are not as charged in the bill of complaint. The persons who organized said Exchange, as well as those who have been added to the member-

ship thereof from the date of its organization to the present, recognize that it would be impossible to fairly and properly conduct the sale of live stock upon commission without the existence of proper rules and an organization to establish and enforce them. That the benefits and advantages thereof and the facilities provided thereby, have not only contributed largely to making Kansas City a desirable point for the sale and purchase of live stock, but have contributed more to maintain it as such and to attract customers thereto, than all other conditions combined, whereby the public has been and is being greatly benefited.

Experience has shown that to the success of such an organization, it is absolutely essential that there shall be a uniform schedule of reasonable commissions, and that all the members shall observe the same, and that by permitting evasions or violations of such schedule, a condition is created by which irresponsible persons might and would bring about a state of unhealthy cutting of prices, a practice unfair to shippers and purchasers and ruinous to responsible persons who carry on the occupation of commission merchants fairly and with due regard to the interests of the persons employing them, and to the standing and future of the said stock yards as a trading point.

The defendants admit that they desire to instill so great a degree of public confidence, to provide rules so fair and equitable and facilities so convenient, and at rates so reasonable, that persons desiring to ship cattle to said stock yards will be attracted to employ some member of said Exchange to act as his commission merchant in the sale and disposition thereof. They have no purpose, however, and have had none, to prevent the shipment and consignment of live stock to persons other than themselves, nor to compel shippers against their free wills, to pay them the commissions provided by the rules of such organization, nor from placing their property on sale at said stock yards, with-

out paying such commission. It is entirely optional with any shipper whether he will make such shipment, or employ a commission merchant, or place his property on sale at said yards; but the defendants admit that it is to the interest of every shipper of live stock to make such shipment and employment.

They deny that they have had or now have any purpose to monopolize the business of receiving, handling, selling, buying, or reshipping of live stock received at said stock yards, or raised in said States and Territories and shipped to said yards, or to prevent the sale of live stock at said yards by any person not a member of said Exchange, but they admit that their rules, regulations, facilities, and charges are such that it is greatly to the interest of such shippers and to the public that a member of such Exchange shall be employed as a commission merchant to effect the sale of said property. They have no desire to prevent any person from acting as a commission merchant in the sale of live stock at said Kansas City, but they admit that it is not to the interest of the public, or of any shipper of live stock, to employ such non-member, and that individually and collectively, the provisions of their articles of association, rules and by-laws are invoked for the purpose of preventing the success of any competitor, either in his effort to destroy said Exchange or to succeed in driving the competitors of such parties from the field.

Instead of having any purpose to obstruct or retard the owners of live stock in the sale and disposition of their property at Kansas City Stock Yards, their whole effort is to provide facilities for making such sales, to attract persons desiring to sell or to buy stock and to promote and increase the volume of business done at said yards.

They say that said Kansas City Live Stock Exchange has no control over or connection with any stock

yards at any other city to which cattle are reshipped or forwarded from said Kansas City.

This answer is verified by the officers and directors of the Exchange. (Record, 172, 173).

THE RULES OF THE EXCHANGE.

The decisive facts bearing upon the question whether the occupation of the defendants, or any portion of their doings, constitute interstate commerce, within the meaning of the Act of Congress referred to are hereafter outlined and further referred to at appropriate pages of the brief.

Should this feature of the case be determined, in whole or in part, in favor of the complainant's contentions, the guilt or innocence of the defendants, in respect of the matters charged in the bill will depend,to all practical intents and purposes, upon the validity of the rules and regulations of the defendant Exchange (Record, 17–72). Substantially all the allegations of the affidavits, in this behalf, will become immaterial if the rules and regulations referred to are adjudged to be valid.

These provisions may be fairly summarized as follows:

The preamble sets forth that the Exchange is organized "not for pecuniary profit or gain, *nor for the transaction of business*, but to *promote and protect* all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to promulgate and enforce among the members correct and high moral principles." (27).

Rule I. vests the government of the Exchange in a Board of Directors and certain officers and committees, for whose election provision is made. (27–29).

Rule II. defines the duties of the President. Among other things required he is to preserve order and busi-

ness decorum during all meetings of the Exchange, and to discipline any member or other person guilty of any disorderly, boisterous, or offensive conduct while in such meeting. (Section 2.) (29).

Rule III. imposes the duties of the President upon the Vice-President in case of the former's absence or disability. (30).

Rule IV. defines the powers and duties of the Board of Directors. The Board is to manage and conduct all the business and financial concerns of the association (section 1); to appoint the Secretary and Treasurer, and such other officers and employes as it may consider necessary (section 2); to require all appointees to faithfully perform their duties (section 3); and to make a full report of receipts and expenditures, and, if necessary, assess each of the members for the purpose of defraying the expenditures of the Exchange. (30-31).

When any member of the Exchange has failed to comply promptly with the terms of any business contract or obligation, or has failed to honorably adjust and settle the same, or has failed to promptly comply with and fulfill an award of the Board of Appeals or Board of Arbitrators, he shall be subject to suspension by the Board of Directors, and if such failure was merely from financial inability or misfortune, such member shall be reinstated after having adjusted his outstanding obligations (section 6); when any member shall be guilty of improper conduct of a personal character in any of the rooms of the Exchange, or of a willful violation of any business contract or obligation, and shall neglect or refuse to equitably and satisfactorily adjust or settle the same, or shall wilfully neglect or refuse to comply with the award of the Board of Appeals or Board of Arbitrators, or shall violate any of the rules, regulations and by-laws of the Exchange, or be guilty of any act of bad faith or any attempt at extortion, or any dishonorable or dishonest conduct, he shall be fined, censured,

suspended, or expelled by the Board, as it may determine from the nature and gravity of the offense committed, seven affirmative votes being, however, necessary to inflict expulsion (section 7); members are required to appear and testify on proper notice, and, for violating or neglecting to do so, and for refusal to answer proper questions, shall be subject to suspension (section 8); a suspended member may be reinstated by the Board (section 9); but an expelled member cannot be readmitted except upon payment of the required initiation fee, and upon satisfactory evidence that he is a fit person for membership, and upon an affirmative vote of at least seven members of the Board (section 10). Charges are required to be in writing, and to state the nature of the default, misconduct, or offense charged, and be signed by one or more members of the Exchange (section 11); and no member shall be disciplined without an examination by the Board, nor without an opportunity to be heard in defense. Notice, accompanied by a copy of the charges, must be served on the accused. (Section 12.) (Record, 31-34).

When the Board is advised by public rumor, or otherwise, that a grave offense has been committed by a member against the good name and dignity of the Exchange, or of any violation of its rules, it shall cause a preliminary or informal investigation to be made, and if a foundation therefor is discovered, charges shall be filed against the member (section 13); standing committees shall be appointed (section 15); special meetings may be called (section 17); vacancies may be filled (section 18); and if a director absent himself from six consecutive regular meetings of the Board without good excuse, the Board may declare his office vacant (section 19). Record, 34–36).

Rule V. prescribes the duties of the Secretary, and rule VI. the duties of the Treasurer. 36, 37).

Rule VII. fixes the duties of the Boards of Appeals and Arbitration. These bodies are required to construe

the rules of the Exchange "as being designed to secure justice and equity in trade, and all awards and findings shall be made in conformity therewith, in accordance with the laws of the land." (Section 1.) These Boards are to determine all matters voluntarily submitted to them by members of the Exchange, and the procedure to be observed in hearing controversies is outlined. (37–40).

Rule VIII. treats of membership. (40–42). Any person of good character and credit and of legal age, whose interests are centered at the Kansas City Stock Yards, may be admitted to membership upon the approval of at least seven affirmative votes of the Board of Directors, and upon the payment of an initiation fee of $2,500, or upon the presentation of a certificate of membership duly transferred, and by assenting and agreeing to abide by the rules, regulations and by-laws of the Exchange and all amendments made thereto (section 1); the transferee of a certificate may become a member upon payment of a fee of $25, and upon being approved by the Board of Directors (section 2). A member engaged in the commission business cannot serve another for compensation contingent upon the business done. Members engaged in the commission business shall register with the Secretary. "No member, or firm or corporation represented herein, shall do any portion of a commission business for any one not registered as above provided, except on a charge of full commission for such services." (Section 3.)

Every member of a firm, and the stock-holders of a corporation engaged in the commission business, must be a member of the Exchange. (Section 4.)

Rule IX. is devoted to the subject of commissions (42–46), and provides that:

a. The commissions to be charged by members for selling live-stock shall not be less than the rates enumerated (sections 1—6);

b. No member shall do business for a yard-trader

or speculator on this market for less than one-half the regular commissions (section 7);

c. No firm shall handle the business of a non-resident commission house for less than full commissions, except that consignments may be made direct to such non-resident from one of the following markets: Chicago, East St. Louis, St. Louis, Omaha, Wichita, Denver, Pueblo, St. Joseph, Sioux City, Peoria, Milwaukee, and Fort Worth, (other live-stock markets), (section 8);

d. No member shall cause or allow live-stock to be shipped in his name for the purpose of violating this rule (section 9);

e. The number of solicitors to be employed and their qualifications are prescribed (section 10);

f. Prepaid telegrams or telephone messages shall not be sent, except quotations to shippers of actual sales of their stock on that day, or to persons desiring to make purchases on this market (section 11);

g. Members violating these provisions shall be fined from $500 to $1,000 for the first offense and suspended from membership on failure to pay the same. For a second offense, the member may be expelled (section 12);

h. A reward of $500 will be paid for evidence showing such violation, payable on condition that a conviction is had (section 13);

i. A special fund of $500 is kept on hand to pay such reward (section 14); and,

j. Firms and corporations are responsible for violations by their representatives (section 15).

Rule X. requires assessments to be paid within 30 days after being made. (46).

Rule XI. provides for a special election in case an election has not been had at the time fixed for the regular annual meeting. (46). Rule XII. provides for a seal. (47).

Rule XIII. is devoted to the subject of a "quorum." (47).

Rule XIV. authorizes the Board of Directors to appoint special committees if deemed necessary. (47).

Rule XV. makes members responsible for the acts of their partners and employes in violating the rules. (47).

Rule XVI. is as follows: "No member shall transact any business with any person *violating any of the rules or regulations of this Exchange*, or *an expelled or suspended member*, after notice of said violation, suspension, or expulsion has been issued by the Secretary or Board of Directors." (47, 48).

Rule XVII. provides "for the creation and maintenance of a fund to employ requisite agencies for the protection of live stock transportation rates affecting the interests of patrons of this Exchange." (48).

Rule XVIII. provides that the responsibility of the seller, as regards inspection, shall cease on all live stock as soon as the same shall have been driven from the scale pen. (48).

Rule XIX. provides that inspectors for different cattle associations or individuals shall file their certificates of appointment with the Secretary. (48).

Rule XX. declares that any evasion of the terms or intent of these rules shall be deemed a violation thereof. (49).

Rule XXI. (49-50) provides that all members, who intend to pay for live stock purchased by dealers, shall file a list of such dealers with the Secretary, embracing a declaration to the effect that such member will pay for all the purchases of live stock made by the party or parties named therein. Having filed such declaration, the member is held responsible for any sum of money which a dealer, whose name appears in such list, may have agreed to pay to any member of the association until the same shall have been paid in full, or otherwise lawfully settled. (Section 1.) When a member desires to

cancel such an agreement, he shall notify the Secretary of the association. (Section 2.) Any member selling live stock for any dealer shall return the proceeds of such sale to the member who has guaranteed the payment of purchases made by such dealer. (Section 3.)

The inspection of hogs is provided for by a separate rule, and is committed to an executive committee of three, one selected by the buying interests, a second by the selling interests, and a third by the Kansas City Stock Yards Company, an arrangement which all interests concur in commending. (51–55.)

THE AFFIDAVITS.

The application for a temporary injunction was heard upon the pleadings and certain affidavits filed by the respective parties. These affidavits are exceedingly voluminous. It would burden this pamphlet unnecessarily to undertake to review them in detail. The complainant's affidavits in chief and accompanying exhibits cover pages 17 to 162, and pages 183 to 228 of the Record, and the affidavits in rebuttal are found on pages 229 to 259.

The defendants' affidavits are to be found on pages 176 to 182.

It is to be observed that the rebuttal affidavits were filed during the hearing, without any previous knowledge of their contents or existence on the part of the defendants, and, consequently, without an opportunity to make any further showing in respect of the matters therein referred to.

I. The sources of the live-stock sold at the Kansas City Stock Yards are set forth at length. Extended reference is made to the geographical situation of the yards, growing out of the accidental division thereof by a State line, and many instances given in which the presence of this line has resulted in causing negotiations and other steps leading to the consummation

of given transactions to be carried on partly in each of two States. (Record 147–151; 155–158; 205–211).

The relation of the defendants to the business is stated to be that "of buying and selling *for others for a compensation for services rendered.*" (Record, 197).

The practice of commission merchants of making loans to enable persons to purchase and feed cattle, to be subsequently sold, is explained. The lenders provide the funds, by endorsing and discounting the notes of the borrowers, which are secured by chattel mortgages on the property purchased with the loan, and discharged out of the proceeds of the ultimate sale. (Record, (147–152; 208).

A commission merchant consummates a sale to a packing house buyer by the delivery of a scale ticket and to others by delivering an order on the Stock Yards Company for the property sold. By these symbolical deliveries the title passes. (Record, 191).

Nearly all the cattle and substantially all the hogs sold at the yards are purchased by the local packing houses. (Record, 150, 154, 204).

The United States Inspection Bureau, on the presence of which the circuit court laid much stress, was instituted "to prevent the exportation and transportation *from one State to another* of diseased cattle, to thereby prepvent the spread of disease among native or domestic animals." (Record, 157).

The principal disease thus referred to is that which came under notice in Railroad Co. v. Husen, 95 U. S,. 465, and Kinnish v. Ball, 129 U. S., 217.

The Quarantine Regulations and other departmental instructions under the Act of Congress on the subject, (May 29, 1884; 23 Stat. L., 31), are shown on pages 218,222, 223 and 227 of the Record.

The Bureau for the Inspection of Food pertains to the products and operations of packing houses and is irrelevant to the occupation under consideration in this case.

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II. The affidavits filed by the complainants on the merits of the case, so to speak, consist largely of conclusions, vituperative denunciations, and hearsay. A few samples will serve as proof: "The misconduct and *wrongful acts* of the defendants (136); * * Greer, Mills & Co. were *boycotted* by the commission men and packers, members of said Exchange (136); * * (certain rules) are *contrary to public policy, prohibited by statute*, and *in restraint of trade* (200); * * (before the passage of the recent Kansas Statute) the Kansas City Stock Yards Company is of a public nature and *invested with a public interest* (205); * * the business is *essentially interstate* in its nature." (259).

Samples of hearsay are the letters and telegrams set out on pages 143-145, and the newspaper clippings on pages 233-235.

The explanation is found in the fact that the principal affiants were employees of Greer, Mills & Co. Thus, Norman B. Greer made three affidavits; James H. Thomson two; and William Winder (for statement of his connection with the firm, see advertisement, p. 180) and R. T. Bass each contributed one.

The affidavits of these parties cover 45 pages of the printed record, and if the exhibits thereto be added, 175 pages are thus covered, nearly *two-thirds of the entire Record*.

Hence it is, that the controversy between Greer, Mills & Company and the Exchange, and the resulting litigation are exhaustively stated. Briefly, that firm became a member of the Exchange; broke the rules they had agreed to observe; were fairly tried, found guilty, and subjected to discipline; their guilt is not denied and the regularity of the proceedings is admitted; they refused to pay the fines imposed, (not from want of means but from wilful obstinacy), and, in accordance with the provisions of the rule on the subject, they were regularly suspended from the privileges

of membership until such payment should be made. Three separate courts were successively appealed to for injunctions. Restraining orders were obtained on *ex parte* bills, each of which was dissolved on the hearing. The last ruling was in Greer v. Stoller, 77 Fed. Rep., 1, upon the announcement of which, the suspension being in full force, their certificates of membership were offered to be surrendered, and the offer accepted without prejudice to their status as members under a valid suspension. Then came this action in the name of the United States and a suit by Greer, Mills & Co., which is still pending in the State courts of Kansas.

The other affiants for the complainant are, as a rule, sympathizers of Greer, Mills & Co., the leading one being A. J. Gillespie, (Record, 152–159) whose partisanship is disclosed by the newspaper interview shown on page 235.

The burden of these affidavits is to show:

a. That Greer, Mills & Co., had been "boycotted" by the Exchange;

b. That the policy of the Exchange was to induce all live stock commission merchants to become members thereof, thereby establishing a "monopoly";

c. That the defendants sought to make it necessary for a shipper of live stock to employ some one of them, and to pay the compensation fixed by their rules, thereby preventing competition as to such rates.

1. The evidence to support the claim of a boycott (*not alleged in the bill*) is briefly this: After Greer, Mills & Co., had been suspended, members were notified of the fact and their attention called to Rule XVI. of the Exchange.

The relations between the parties are thus stated by Mr. Greer: "All the other live stock commission merchants at Kansas City are *competitors* of Greer, Mills & Co." (Record, 142), and the conduct of the defendants, characterized as a "boycott," was detailed to be:

While no restraining order was in force "the commission men at said Kansas City Stock Yards *refused to trade or deal in any manner* with the firm of Greer, Mills & Co." (Greer, Record, 135); Mr. Bass, after stating that the difficulties confronting his firm arose solely out of their non-payment of the fine assessed against them (and it may be noted that if the same was illegal and had been paid under protest, it could have been recovered back, at comparatively small expense, and this difficulty avoided), testified that while the suspension was in force, "as a general rule the packing houses and speculators *refused to purchase* from me as the representative of Greer, Mills & Co." (Record, 162).

"Posting" is thus defined by Mr. Thomson, cashier for Greer, Mills & Co.: "This is understood to mean that they (the members) shall *refuse to do business or trade with such member so posted.*" (Record, 199).

While the suspension was in force, Greer, Mills & Co. found no difficulty in disposing of consignments by employing a member in good standing (Record, 136, 137, 139). In one instance, *they refused to make such employment* and their conduct in reshipping to another market caused a loss, (136).

The other means resorted to were stated by Mr. Greer to be that the members "used the *moral influence* of the entire combination" (Record, 150); and these means are characterized by the others who deposed on the subject as "influence" (Record, 160, 199, 200, 212). Mr. Thomson added that "by the *mere force of numbers* and *the influence* each and all can bring to bear, etc." (Record, 204).

It is said that Rule XVI. "*practically makes a boycott* or prohibition upon any one trading at this market who refuses to be governed by Rule IX." (Record, 155); and Mr. Howard deposed that under XVI. a posting is "understood to be a direction from the Exchange *to refuse to trade or do business with* the member so posted." (Record, 215).

It is universally conceded that the purpose of the defendants is to make the Exchange a success, by requiring members to observe the rules which constitute the contract between them. Mr. Gillespie, admitting that he has signed an agreement to observe the rules (Record, 158), said that he could not trade with Greer, Mills & Co. because of the notice under Rule XVI., and that if he broke *his contract* he would be in danger of losing his membership (153). Mr. Plummer said that "in talking with members of the Exchange affiant learned that they consider *their agreement to abide by the rules* so strong and binding on them that they *refuse to do business* with such person or firm posted or antagonized by the Exchange and often go outside *to influence* others against trading with such person or firm." (189). Mr. Greer states that as the result of the enforcement of Rule XVI., "the said firm of Greer, Mills & Co. were practically shut out of the market at Kansas City, *so far as dealing with any packing house or member of the Exchange was concerned.*" (213).

While the corporations or firms owning packing houses, as such, are not members of the Exchange, memberships therein are held by managing officers, and by employees whose duties as buyers bring them in contact with the market (Record, 137, 154), all of whom are deeply interested in maintaining the high standing of the market built up by the Exchange. And, therefore, "the packing houses are largely *influenced* by the wishes of the Exchange." (155).

2. It is complained to be "the policy of said Exchange to require every person and firm doing, or attempting to do business, *as live stock commission men*, at said yards, *to take out memberships*, and that on their failure to do so the members of said Exchange are notified not to deal with said persons or firms." (Record, 145). "It would be very difficult for any commission man to carry on a commission business successfully without becoming a member of the Exchange." (158).

Although the complainant took the deposition of the Secretary of the Exchange and examined the minutes of the directors' proceedings in detail (Record, 183), only *two* instances were disclosed in which this policy was enforced. In the one case, Mr. Harris undertook to "carry speculators on commission" (a course of dealing in which Rule XXI. requires a guarantee of purchases, efficacy to which is given by sections 6 and 7 of Rule IV.). On being requested to take such membership, he seems to have concurred in the propriety of the suggestion and acted accordingly. (Record, 146, 184). It appeared from the Secretary's testimony that when such a suggestion was not complied with, as had been the case in several instances, "*no action whatever was taken.*" (185).

The other instance was that of a Miss Goodwin, who applied for membership on being requested. Her application was granted, but she did not pay the initiation fee. It was proposed and practically voted to present such membership to her as a *gratuity*, but because some few members did not concur, she refused to accept the same. The Board took no further action. (Record, 184–5; 195). Certainly, she was not "posted."

It appears from Mr. Greer's affidavit that he succeeded in selling a consignment direct to a purchaser, who had previously employed a member to act for him, without the slightest effort on the part of such member to interfere, although he witnessed the transaction and lost his commission as a result. (Record, 142–3).

It appears that, at least, Plummer (for 7 or 8 years), Chapin (for over 3 years), and Kennedy (for 5 or 6 years), had done business as speculators unmolested and without being approached by the Exchange. (Record, 186, 187, 197, 211).

3. It is said to be "very difficult" for a shipper to sell his cattle and to look after all the details attendant upon their inspection, feeding, watering, sale, weighing, and delivery, and the collection of the proceeds, without

employing an experienced commission merchant (Record, 159), and that such employment has become "a *necessity*," (206). Hence it is, that "nearly all" stock shipped to said yards is thus consigned. (160). It is not said that such employment is necessary in the *purchase* of stock. Certainly, the packing houses make no such employments, and that others may so purchase, acting for themselves, is shown by the incident detailed by Mr. Greer (142–3), and by the account given by Mr. Morris of the manner in which live-stock is paid for by the "commission merchant *or party* making the purchase." (191).

In addition of their sworn answer (which, under the 41st Equity Rule, as amended, has the force and effect of an affidavit, although an answer under oath was waived in the bill), the defendants filed two formal affidavits.

The one (Record, 176-181), protested that most of the matters stated in the complainant's affidavits "do not relate to, and have no bearing upon, the allegations of the bill of complaint, but consist of extraneous matters having reference to private controversies between Greer, Mills & Co. and the Exchange, or between said firm and individual members of the Exchange."

This affidavit explained that Greer, Mills & Co., having been disciplined and suspended, announced a purpose to destroy this Exchange and its usefulness, although its rules were practically literal copies of those prevailing at the Chicago Exchange, of which body the members of said firm were prominent members, several of them having held, and one of them now holding, official positions therein. (176-7).

Any "boycott," or purpose to resort thereto, was emphatically denied. It was shown that Greer, Mills & Co. had been industriously using the phrase to gain sympathy, to arouse prejudice against the Exchange, and to lay the foundation for evidence to be used in their several suits. The defendants have no thought of going outside of or beyond their rules (177), but

have treated the controversies as involving these propositions: (*a*), whether members of the Exchange will comply with the contractual rules, or elect to withdraw by dealing with Greer, Mills & Co., in preference to holding such membership; and, (*b*), whether Greer, Mills & Co., suspended members or competing non-members, are entitled to *compel* members in good standing to deal with them. (178).

A great majority of purchases of cattle to be further fed, known as stockers and feeders, are made without the services of a commission merchant and without regard to whether the seller is an Exchange member or not. (178-9).

The necessity for an Exchange was reiterated, and the reasons why those dealing at such a market concur in assisting it to maintain itself, are stated in full. (179). The occasions for enforcing the rules on the subject of honorable dealing, *i. e.*, enforcing a moral obligation on the part of members in favor of non-members, have been many times more numerous than the steps to discipline members violating the rules sought to be annulled in this case. (179).

Under the heading of "Some of the people who have made Kansas City the greatest live stock market in the world," the members and employees of Greer, Mills & Co. caused wood-cuts of themselves to be circulated, as recently as January 17, 1897, (after the institution of this suit), in connection with similar cuts of about 100 members of the Exchange. (180, 181). That the Exchange did so *make* the Kansas City market was admitted (181). An advertisement by Greer, Mills & Co., soliciting consignments and showing that they were likewise engaged in business at Chicago and St. Louis, was also offered. (180).

The other affidavit was in response to a statement made by Mr. Thomson (Record, 207) that "before the formation of the Exchange, and the adoption of its rules, the commissions charged were about one-half of

what they have been since," and was signed by a number of gentlemen, some of whom had acted as commission merchants at Kansas City as far back as 1871 (182). It was shown that, on the contrary, commissions had been *substantially reduced;* that the rates are not only conceded to be reasonable, but that they are as low as reputable persons can afford to render such services for; that from 50 to 70 per cent. of the amounts earned from this source are necessarily expended in properly conducting the occupation; and that, except in rare cases for a limited period, the result is no more than a living return, and that for the greater part the members of said Exchange are possessed of limited means only. (182). In the other affidavit it is shown that "the rates provided for are no higher than the fair and reasonable compensation for the services rendered and are the same as those which prevail at other stock yards." (180).

In rebuttal, a number of affidavits were permitted to be read to the effect that while, prior to the formation of the Exchange, "the ordinary commission was fifty cents per head" (229), yet a system of *secret rebates and discriminations* prevailed on the part of some of the commission merchants, by means of which favored shippers—especially large cattle companies—were able to obtain lower rates. Mr. Greer explained that this was accomplished by charging the full rates on account sales (for examples, see 240-249), and keeping a separate rebate account, or otherwise concealing the truth of the transaction. (237).

An exhaustive affidavit by A. Wagoner was also read, (253-259), in which the origin of the Chicago Live Stock Exchange was traced and an argument made against the "combination" and "monopoly" resulting from Exchanges. Unfortunately, in the absence of a disclosure of the relations borne by the affiant to Greer, Mills & Co., and because the affidavit was produced too late to permit a counter-showing and because the situa-

tion did not permit a cross-examination, the credibility of the witness cannot be satisfactorily considered. However, the tone of the affidavit sufficiently establishes the animus of the affiant in setting up his unsupported opinion (for not even the other employes of Greer, Mills & Co. expressed a concurrence therein) against what the brief will show to have been, in all civilized countries and for centuries past, the universal opinion of legislatures, courts, departmental officers, statesmen, political economists, and merchants, on the general subject discussed.

THE ORDER OF INJUNCTION.

In pursuance of and for reasons stated in an opinion, (Record 260, 277, and reported 82 Fed. Rep., 529), which is reviewed in the brief, the circuit court granted a temporary injunction to the following effect (Record, 277):

a. "The defendants, and each and *every one of them*, their agents, servants, and employes are hereby enjoined, *either as associates* in the Kansas City Live Stock Exchange *or otherwise*, from combining, by contract, agreement or understanding, *expressed or implied*, so as by their *acts*, *conduct* or *words* to *interfere with*, *hinder or impede others* in shipping, trading, selling or buying live stock that is received from the States and Territories at what is known as the Stock Yards at Kansas City, Missouri, and Kansas City, Kansas, and *shipped there from other States and Territories for sale there*, or for further transportation for sale in or shipment to foreign markets. * *

b. "The said defendants, *either collectively* as such Kansas City Live Stock Exchange, or through its Board of Directors, or *otherwise*, and *each of them*, their agents, servants or employes, be and they are hereby enjoined from enforcing or *recognizing or acting under* the following rules of said Kansas City Live Stock Ex-

change, towit, Rules 9 and 16, each and every section thereof and any and all amendments thereto, in respect to such live stock; and,

c. "From imposing or attempting to impose any fines or penalties upon any of the members of said Kansas City Live Stock Exchange, *for trading or offering to trade with any person or persons* at said Stock Yards respecting the purchase and sale of any such live stock; or,

d. "From *discriminating in favor of any member* of said Kansas City Live Stock Exchange, because of such membership; and,

e. "Especially from *in any manner discriminating* against ANY PERSON trading at said Stock Yards in such live stock; and,

f. "From refusing, by united or concerted action, or *by word, persuasion*, threat *or other means*, to deal or trade with persons, with respect to such live stock, who are not members of said association, because of such non-membership; or,

g. "*In any manner, from interfering with* the right and freedom of any and all persons trading and desiring to trade in such live stock at said Stock Yards, *the same as if such Kansas City Live Stock Exchange did not exist.* * *

h. "The defendants, and each of them, their servants, agents and employes, be and they are hereby enjoined and prohibited from entering into any contract, agreement, combination or conspiracy *fixing or tending to fix, directly or indirectly, the price to be charged as commission for buying or selling live stock*, shipped from one State or Territory for sale or disposition in another State or Territory;

i. "Also, from entering into any contract, agreement, combination or conspiracy limiting or attempting to limit the right of any person in business at said Kansas City Stock Yards *to employ labor or assistance*

in soliciting shipments of live stock from other States or Territories, or,

j. "The right of any such person to *send telegrams, pre-paid or not*, from said Stock Yards to any other State or Territory."

An appeal was granted, and a supersedeas allowed (Record, 278, 279, 285, 286).

ASSIGNMENT AND SPECIFICATION OF ERRORS.

The assignment of errors challenges the correctness of the action of the circuit court upon twenty-five grounds, all of which were duly assigned, most of them at length (Record, 279–284).

The scope of these assignments can readily be gathered from the propositions advanced in the several paragraphs of the accompanying brief and argument. The propositions thus contended for embody the converse of the conclusions of the circuit court, and, for convenience and because it is believed that thereby a clear understanding of the questions involved can be had, the appellants specify as error the action of the circuit court in *not holding* the propositions referred to, which are substantially as follows:

1. The defendants are not engaged in interstate commerce.

2. The defendants' occupation constitutes merely an aid to commerce; at most, their rules have only an indirect or incidental effect thereon; their charges are merely for services rendered and facilities provided, locally; and when live-stock has been unloaded at the Kansas City Stock Yards, for sale to the public generally and in quantities to suit the purchaser, it is no longer a portion of interstate commerce, though shipped from another State, and though solicited, in such other State, to be so shipped by the commission merchant employed to sell the same, and though the purchaser may intend to thereafter reship the same to another State.

3. The Act of Congress of July 2, 1890, was not intended to transform the many Exchanges existing in the United States into unlawful combinations and their members into criminal offenders.

4. Exchanges do not constitute combinations or conspiracies in restraint of trade. On the contrary, they promote and facilitate it.

5. An Exchange is not a monopoly, in a legal sense, not being engaged in any business whatever; and its rules are merely a code of usages for the orderly conduct of the occupation of its members, and an agreement in respect of the manner of conducting the same honorably, and with uniformity, to the end that trade may be promoted and every interest protected and benfited.

6. An Exchange is a merely private body. The occupation of a member is emphatically private. Membership is a matter of contract. No one is entitled to the privileges thereof unless he be a member in good standing; and it is lawful to thus limit such privileges, and to refuse to have business intercourse with suspended or expelled members, or with non-members.

7. It is lawful for an association of persons engaged in a private occupation to agree not to deal with a competitor, and they may even persuade, or use their influence to induce, others to act with them in such refusal.

8. It is lawful for an association of persons engaged in such private occupation to agree on a schedule of wages or commissions and to require fellow-members to keep their contract to adhere to the same. It is also lawful for the associates to agree upon the manner of carrying on their occupation in respect of the employment of solicitors, the sending of prepaid telegrams, and the division of commissions with persons engaged in a similar occupation elsewhere and who may seek their co-operation.

9. The case of United States v. Trans-Missouri

Freight Asso., 166 U. S., 290, does not decide that the defending Exchange, or any of its rules, are violative of the Act of Congress referred to.

10. Said Act can only be applied to contracts which are actually—in distinction to constructively—in restraint of trade or commerce among the States.

11. If each and every contract concerning or affecting such trade or commerce, or the manner of conducting it, is construed to be prohibited by the said Act of Congress, the statute is made violative of the Fifth Amendment to the Constitution of the United States, in that it will operate to deprive the defendants of liberty and property without due process of law, and as a "legislative judgment."

12. A mere association or combination of persons engaged in a private occupation for the purpose of facilitating trade or of benefiting themselves, is not illegal. There is no evidence in this case of a resort to, a "boycott," threats, or other unlawful means. The fact that competitors are not supinely permitted to succeed does not prove a conspiracy.

13. Isolated acts by individual members against persons who are commercial competitors cannot be made the basis of destroying the Exchange as an entirety.

14. The opinion and order of the circuit court, in effect, adjudicate a private controversy between Greer, Mills & Co. and the defendant Exchange, a matter not alleged in the bill, and which cannot be litigated in a civil proceeding instituted by the United States. As to such private matter, the defendants cannot be deprived of their constitutional right to a trial by jury.

15. It appearing that this proceeding was prosecuted in a private interest and for the promotion thereof, and was instigated by private malice, it should have been dismissed as an imposition on a court of conscience.

16. It was error, upon the facts disclosed by thi Record, to issue a temporary injunction, *mandatory i form*, and operating, to all intents and purposes, as *final decree*.

17. The bill should have been dismissed.

Stating our specifications of error affirmatively, th circuit court erred in respect of each and every claus of the order of injunction from which this appeal i prosecuted, for reasons particularly stated in the assign ment of errors and elaborated in the accompanying brief, to which reference is made for a detailed state ment of the positions of the appellants in reference t said order.

BRIEF AND ARGUMENT.

NOTE.—Owing to the importance and nature of the questions involved, and to the fact that because of the novelty of many of them, there is a lack of text-books, or other condensed discussion, precisely devoted to many of the matters herein considered, this document, (necessarily, perhaps; pardonably, it is hoped), has become quite voluminous. In view of that circumstance, and in the hope that thereby the propositions discussed and presented can be the more readily referred to, and the labors of the Court correspondingly lightened, a *Table of Contents* has been prefixed, to which attention is respectfully invited.

I.

THE ACT OF CONGRESS OF JULY 2, 1890, APPLIES, AND CAN CONSTITUTIONALLY BE MADE TO APPLY, ONLY TO SUCH MATTERS PROHIBITED THEREBY WHICH CONSTITUTE **Interstate Commerce**; AND

THE DEFENDANTS ARE NOT ENGAGED IN SUCH COMMERCE.

As these propositions, in effect, involve the element of jurisdiction, it is proper to consider them *in limine*.

1. The Act in question does not deal with contracts in restraint of trade as such, nor was it intended to apply to monopolies or attempts to monopolize merely because of their effect on interstate commerce. Its

scope is to denounce contracts and combinations whose object and necessary consequence are a restraint upon or monopoly of such matters as *of themselves constitute such commerce in the legal sense.* Be the *effect* on interstate commerce ever so great or oppressive, if this be merely *incidental* to the contract or combination in question, the statute is not only inapplicable, but could not constitutionally be made to apply, for want of jurisdiction on the part of Congress over the subject.

United States v. E. C. Knight Co., 156 U. S. 1.

This authoritative construction of the Act in question may be fairly summarized as follows:

a. It can only be applied to such matters as of themselves and directly constitute interstate or international commerce. (10.)

b. It does not amount to a declaration by Congress of a purpose to regulate all commerce, but has reference only to those matters over which Congress has, by other enactments, assumed to exercise authority by providing regulations. (11, 12, 16, 17.)

c. The intent of a producer that a given article shall be shipped to another State, and thus become the subject of interstate commerce, does not bring a contract affecting such article within the terms of the Act or the power of Congress. (13.)

d. That the purchaser of an article, which has been the subject of interstate transportation, or of such a commercial transaction, intends to transport such article into another State, or to make it the subject of further transactions of interstate commerce, is likewise immaterial. (14).

e. Where the result of the contract or the attempted monopoly, in respect of interstate commerce, is "*indirect, however inevitable* and *whatever its extent*," it does not fall within the Act. (16).

f. "Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive

industries, whose ultimate result may affect external commerce, comparatively little of the business operations and affairs would be left for State control." (16.)

g. Although in such a case as this, the article has actually been "forwarded to other States for sale," and "in order to dispose of the product, the instrumentality of commerce was *necessarily invoked*," this has no tendency to prove that a contract concerning such article was intended to restrain or to monopolize the "*commerce*" therein; at most, such a contract only *incidentally* and *indirectly* affects that commerce. (17.)

h. The dissenting opinion of Mr. Justice HARLAN summarized the ruling of the court to be that it is, "in effect, held that the statute would be unconstitutional if interpreted as embracing such unlawful restraints upon *the purchasing of goods in one state to be carried to another* as necessarily arise from the existence of combinations formed for the purpose and with the effect not only of *monopolizing* the ownership of all such goods in every part of the country but of *controlling the prices* for them in all the States," (42, 43), and that the Act does not reach combinations to control "the price of articles purchased to be transported from one State to another State," (43.)

When the case was decided in the Circuit Court, it was said: "It is the stream of commerce flowing across the States and between them and foreign nations that Congress has authority to regulate. To prevent *direct interference* with or disturbance of this flow alone, was the power granted to the Federal government. Congress has, therefore, no authority over articles of merchandise, or their owners, or contracts or combinations respecting them, which have not entered into this stream, or having entered, have passed out."

United States v. E. C. Knight Co., 60 Fed. Rep., 306, 309, 310.

The opinion of the Circuit Court of Appeals af-

firmed these views, (60 Fed. Rep., 934,) and proceeded in acceptance of the construction placed upon the Act in question soon after its passage, in a carefully prepared opinion from the pen of Mr. Justice JACKSON, universally recognized as a very great authority in matters of interstate commerce.

In re Greene, 52 Fed. Rep., 104, 112-114.

In a very recent case on the subject, the cases are elaborately reviewed and critically analyzed, and the distinctions established by the decisions of this Court thus lucidly expounded:

"It will be readily seen that the cases recognize the distinction between *the subjects of commerce* and *commerce itself*, as well as between the instruments of and *aids to such commerce*, and the *actual business of commerce*. In regard to State legislation, it has been declared from the beginning that, to render such legislation subject to constitutional objection under the commerce clause, the effect of the legislation upon interstate commerce must be *direct*, and not *incidental* or *indirect*. This general statement of the law, so often repeated, has been illustrated by the varying facts of many cases. * * In considering a question of this delicate nature, proper and practical distinctions become extremely important. *A particular business must be distinguished from the mere subjects of the business and from mere incidents to or instruments by which the business is carried on.* (718, 719.) * * * Federal authority exists only when a monopoly or a contract in restraint of trade assumes such form or has such effect as to * * interfere directly or substantially with interstate commerce, or commerce with foreign nations; and this it must do *directly* and *not indirectly*." (722, 723.)

United States v. Addyston Pipe Co., 78 Fed. Rep., 712.

2 The contentions of this complainant are that the defendants are engaged in interstate commerce, in the

sense declared by the authorities, for reasons which may be summarized, so as to bring all the details of the argument under general heads, as follows:

a. The Kansas City Stock Yards, at which these defendants exercise their occupation, are situated on both sides of the State line between Kansas and Missouri.

b. Live-stock is shipped to said yards for sale from many States and Territories, and the purchasers thereof, in many instances, subsequently drive or transport the same to other States.

c. A commission merchant, at times, opens negotiations with a purchaser in one State concerning live-stock then located in pens situate in another State.

d. The course of trade is such that at times, the negotiations and the steps for consummating a contract of sale are carried on or taken partly in each of two States.

e. The defendants use the telegraph in their business and this, when running from one State into another, is engaged in interstate commerce; and also employ solicitors to travel into other States and solicit consignments.

f. At times live stock is shipped to a commission merchant in one State, by virtue of his attitude as a mortgagee thereof, from an owner (mortgagor) residing in another. At other times, drafts are drawn by a consignor in one State on a commission merchant resident in another.

g. A consignment of live-stock remains an "original package" until actually sold and delivered, to the extent that all third persons rendering services in connection with such sale and delivery are engaged in interstate commerce.

If any other contentions are relied on, it is believed and submitted that if they are not mere variations of the points enumerated, they are covered by and can be determined in the light of the cases herein cited.

Some of the matters referred to can be readily solved and laid out of further consideration.

Location of the Kansas City Stock Yards.

That the location of these yards, however unique from a geographical standpoint, does not have the effect to make all business there done, *per se*, interstate, was decided by trial court in Cotting v. Stock Yards Co., 79 Fed. Rep., 679, 682; and its ruling was subsequently reiterated by Judge Thayer, in the same case, (82 Fed. Rep., 839, 852). This was also conceded in the pending case. (Record, 271.)

A moment's reflection will demonstrate that in such a case the accidental location of a place of business on both sides of a State line cannot have the effect to make it, of itself, an habitat of interstate commerce, where no State law can have operation. If the building were a store similarly situate, would the owner be exempt from local taxation? Or if it were a place for the sale of oleomargarine, or other article, (not within the purview of the Wilson Bill), the sale of which is prohibited or regulated by many of the States, could the seller laugh defiance at the State authorities? If the argument of counsel on this branch of the case were correct, property lying along State lines would soon reach *a fabulous valuation.* Grain elevators, gas and water companies, and other enterprises affected with a public use, would escape all State regulation of charges or rates, and every species of local taxation, by the simple expedient of building a part of their structures or plants in each of the two States. The conclusion must be that in such a situation some of the business is done in one State, the remainder in the other; but that none of it is interstate, *i. e.*, carried on in *neither* state, but solely and alone as a Federal transaction.

THE DEFENDANTS' RELATIONS TO COMMERCE.

The attitude and occupation of these defendants cannot justly be treated as bearing the same relation to commerce as does a railroad train, a vessel, a ferry-boat, or a bridge leading from one State to another. Transportation or carriage by means of or over these often constitutes commerce itself. These defendants are not engaged in commerce. At most, they are *mere aids* thereto.

Whatever may be the bearing of the recent case of United States v. Trans-Missouri Freight Asso., 166 U. S., 290, in other respects, there is one point concerning which that case is without dissent and conforms to the unbroken current of authority: it is made an imperatively essential element to the maintenance of an action under the Act of Congress in question that the contract under attack must *directly* involve the ingredient of interstate commerce. As applied to the facts of this case, this presents the inquiry whether the defendants—the persons who have agreed to observe the rules under consideration and who, therefore, are the only persons who can be claimed to be restrained thereby—are engaged in interstate commerce. As will be shown under a subsequent paragraph, there is, in this case, no element of unlawful means, such as would constitute an interference with commerce within the rules of *Ex parte* Debs, 158 U. S., 568, and kindred cases. If it be said that non-member brokers are restrained in their effort to successfully compete with the defendants, the case is not changed; for the Act could not apply in that event, unless those persons were likewise engaged in interstate commerce,—even though such private interest could be litigated in a civil action instituted (nominally at least) by the Government, a proposition hereinafter considered.

The distinctions between matters which constitute "*commerce itself*," and those which are mere *incidents*

thereto, and between alleged interferences which *directly* affect interstate commerce, and those which do so only *incidentally* or *indirectly*, are fundamental, and this Court has strongly impressed that they should never be lost sight of.

Hooper v. California, 155 U. S., 648, 655;
Henderson Bridge Co. v. Kentucky, 166 U. S., 150, 154.

It was doubtless in specification of this distinction that the opinion in the Trans-Missouri case, 166 U. S., at 313, was so careful to prescribe, as a vitally essential element, that a given contract, in order to fall within the Act, must, "*by its direct effect*, produce a *restraint* of (interstate) trade or commerce."

It so happens that the case which is universally referred to as first establishing this distinction is literally in point, and it has special bearing because it actually used the status of a *broker* performing services of the same character as do these defendants, as a decisive illustration. That case was decided by the Court at a time when the construction of the commercial clause of the Federal Constitution was a matter upon which the judges were usually widely divided in opinion and one which had recently been the subject of many arguments and of discriminating consideration. (See the License Cases, 5 How., 504, and the Passenger Cases, 7 How., 283.) In the latter case, Mr. Justice McLEAN had instanced that although a particular service or agency might, to some extent, affect property which was the subject of interstate commerce, as the construction of a ship or stage, such service or agency was not within the commercial power of Congress. (7 How., at 402.)

Great weight is, therefore, to be given to the ruling made in a case which involved the question whether a person engaged in dealing exclusively *in foreign exchange* was subject to a local license law, the contention being that he was engaged in interstate commerce. The unanimous opinion of the Court was delivered by Mr.

Justice McLEAN. It was ruled that a given business might "be an *aid* to commerce," without being "*commerce itself*," nor an article thereof. The status of a *cotton broker* handling that product at New Orleans, precisely as these defendants handle live-stock at Kansas City, was defined, by way of decisive illustration: "*He is not engaged in commerce*," but merely supplies an aid to or facility of commerce, the use or existence of which has only an incidental or indirect effect thereon.

Nathan v. Louisiana, 8 How., 73, 81.

It cannot be doubted that an association of dealers in foreign or interstate exchange, by way of a Clearing House or the like, fixing rates of exchange and interest, and the charges for making collections, would not be said to come within the Act of July 2, 1890, nor their rules to constitute a contract concerning commerce itself. And yet, *the cotton broker selling cotton raised in another State for export to a foreign country* is declared to occupy the same attitude; and so must a broker who negotiates sales of *live-stock*. The nature of the commodity is, self-evidently, immaterial.

SERVICES RENDERED AND FACILITIES PROVIDED.

The distinction between commerce itself and restraints thereon, on the one hand, and services rendered and facilities provided for the transaction of commerce, on the other hand, runs through and is supported by numerous cases, in many of which the difference between an *occupation*, and *trade or commerce*, has also been considered. It is to be observed that these cases treat of the subjects of contracts in restraint of trade and of monopolies; some were decided under Anti-Trust statutes; and most of them, indeed, treat of the very subject of interstate commerce.

Thus, Lord ELDON held, considering an objection to a contract in reference to the services of an author

on the ground that it was in restraint of trade: "*The case of trade is perfectly distinct.*"

Morris v. Colman, 18 Vesey, 437;
National Benefit Co. v. Union Hospital Co., 45 Minn., 272, 276.

Mere services rendered by persons exercising an occupation do not constitute trade or commerce within the meaning of Anti-Trust statutes.

Queen Ins. Co. v. State, 86 Tex., 250;
State v. Phipps, 50 Kas., 609, 615, 620.

And in considering the precise subject of interstate commerce, it has been decided that the services of a railroad company in switching cars to or from warehouses, mills, and other places of business, although such cars contain freight coming from or intended to go into another State, do not constitute such commerce, but are *merely charges for services rendered locally.*

Chicago etc. Ry. Co. v. Becker, 32 Fed. Rep., 849, 854.

Of a similar situation, Mr. Justice JACKSON held that the company "is not only a transfer company or agency engaged in performing *a switching service*, for which it demands and receives from the party for whom such service is rendered, not traffic rates on the freight distributed or transferred, but simply a charge for the shifting of cars, loaded or empty, from one line or connection to another," which did not make it an agency of interstate commerce, although the cars were loaded with interstate freight. (615–9).

Kentucky etc. Bridge Co. v. Louisville etc. Ry. Co., 37 Fed. Rep., 567.

This Court, in a large number of well-considered cases, has firmly established that charges for services rendered in and about the transportation and sale of interstate shipments neither constitute a part of the commerce therein, nor a restraint upon or impediment to the same.

The question has arisen under a variety of circum-

stances. And it deserves to be particularly noted that in nearly every instance the article in question was in its "original package," and in other respects fully within the rules so strenuously invoked by this complainant.

Thus, in the leading case of Brown v. Maryland, 12 Wheat., 419, after declaring that the right to bring an import into this country carried with it the right, as part and parcel of the privilege acquired by the payment of the custom duties exacted, to sell the article, so long as it was in its original package and had not become mingled with the general mass of the local property, Mr. Chief Justice MARSHALL pointed out that this did not authorize the importer to carry the article from place to place and to thus offer it for sale. He then proceeded:

"So if he sells by *auction*. Auctioneers are persons licensed by the State, and if the importer *chooses to employ them, he can as little object to paying for this service, as for any other for which he may apply* to an officer of the State. The right to sell may very well be annexed to importation, *without annexing to it, also, the privilege* of using the officers licensed by the State *to make sales in a particular way*."

Brown v. Maryland, 12 Wheat., 419, 443.

While the illustration given involved the element of a license from the State, this was in no wise in the way of a limitation. It is quite as true to say that the importer cannot refuse to pay for the services of any person, whether required to be licensed by the State or not, whom he chooses to employ to assist him in making sale or to facilitate the disposition of his property. For instance, the *drayman* employed to carry the goods to a warehouse or storeroom; the *owner of the premises* rented as the place of storage or sale; the *weighmaster* invoked to weigh the goods; the *newspaper publisher* who advertises the property for sale; the *watchman* charged to protect it; the *insurance company* issuing a

policy covering the articles; the *broker or commission merchant* whose services are invoked to find buyers or to negotiate sales; the *clerk* who makes or records sales, or the *attorney* who prepares the contract evidencing the disposition of the import; or the *banker* who provides the funds to make payment therefor; none of these persons would be engaged in interstate commerce. None of them, by refusing to serve the importer, could be said to be obstructing or impeding such commerce; and none of them, because of their membership in an association fixing the drayage rates, rents, weighing charges, advertising rates, wages, insurance premiums, commissions, fees, or rates of exchange or interest, to be charged by them, respectively, could be said to be within the Act of Congress. Nor, because their services were desirable or even essential, "however inevitable and whatever their extent," (156 U. S., at 16), could any of them, or all of them combined, be said to be guilty of an attempt to monopolize foreign or interstate commerce.

Trade Mark Cases, 100 U. S., 82, 95.

In each of these instances, the compensation demanded would not be a burden upon commerce, "but a *compensation* for the increased facility afforded," or "for services rendered."

Passenger Cases, 7 How., 283, 403;
State Freight Tax Case, 15 Wall., 232, 278.

Such services would not possess at least one of the absolutely essential elements of interstate commerce: that the thing in question must be the "subject of *trade and barter* offered in the market as something having *an existence and value independent of the parties to them*;" it must be "an article of commerce—a *commodity* to be shipped or forwarded from one State to another and then put up for sale." This description cannot be applied to mere personal services, a contract for which is non-assignable and cannot be bartered or sold,

but occupies, in this respect, precisely the same status as an insurance policy.

Paul v. Virginia, 8 Wall., 168, 183.

COMPENSATION FOR FACILITIES PROVIDED OR SERVICES RENDERED.

In Woodruff v. Parham, 8 Wall., 123, the test, which counsel for the complainant have declared to be, and which the Circuit Court accepted as, a *decisive* one, *i. e.*, whether *the taxing power* of a State could be exercised under the particular circumstances came under consideration. It was ruled below that the State could not tax the live-stock while at the Stock Yards, nor exact a license from the commission merchant employed to sell it for the non-resident owner. We shall notice the right to tax the property under such circumstances later on. It is to be noted, however, that the *owner of property* may be engaged in interstate commerce, and *the property itself* be the subject thereof, without having the effect of subjecting a *person employed* to feed and water it, *en route* or at destination, or to make sales of the same, or to render other services in respect thereof, to a similar status. Woodruff v. Parham, (and there are many cases following it), upheld the right of the State of Alabama to tax *auctioneers* who "received, in the course of their business, for themselves, (*ex. gr.*, because they held a chattel mortgage on the property or had paid a draft for its approximate value, with a bill of lading attached), or *as consignees and agents for others*, large amounts of goods and merchandise, the products of States *other than Alabama*, and sold the same in Mobile to purchasers in the *original and unbroken packages*."

At this point it is proper to note that such cases as Welton v. Missouri, 91 U. S., 275, Cook v. Pennsylvania, 97 U. S., 566, the Dressed Beef Cases, 136 U. S., 313, and others of the same character, rest upon the

essentially distinct ground of a *discrimination*, by means of State legislation, against the products of a foreign country or a different State, as such, and that the rules there laid down have no application to the general question discussed in Parham v. Woodruff and kindred cases.

Guy v. Baltimore, 100 U. S., 434, 442, 443;
Emert v. Missouri, 156 U. S., 296, 314, *et seq.*;
Plumley v. Massachusetts, 155 U. S., 461, 468–471.

Recurring to the cases not involving the element of such discrimination, it will be found to be conclusively established that charges for pilotage, wharfage, the use of an artificial canal or lock, and the like, though exacted from vessels or goods in course of being moved from one State to another, do not amount to a prohibited regulation of commerce, nor are the parties making such charge, in consequence, engaged in interstate commerce. "*A charge for services rendered or for conveniences provided is in no sense a tax or a duty*," nor a hindrance or impediment to commerce, whether exacted by a State, municipality, or private person. "It is *in no sense* a regulation of commerce between the States," and likewise a "mistaken assumption" that such charges "are *restraints* of commerce."

Packet Co. v. Keokuk, 95 U. S., 80, 84, 85, 88;
Packet Co. v. St. Louis, 100 U. S., 423, 429;
Vicksburg v. Tobin, 100 U. S., 430, 432;
Packet Co. v. Catlettsburg, 105 U. S., 559, 562;
Transportation Co. v. Parkersburg, 107 U. S., 691, 698;
Head Money Cases, 112 U. S., 580, 596.

Be it ever so necessary for the owner to invoke such services in order to successfully conduct an interstate commercial transaction, for *essentiality* is not the test, nor even an element, in determining the question.

McCall v. California, 136 U. S., 104, 111.

" Reasonable charges for the use of property, either

on water or land, are not an interference with the freedom of transportation between the States secured under the commercial power of Congress."

Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196, 217;

Johnson v. Chicago etc. Elevator Co., 119 U. S., 388, 400.

Such charges, whether they be for the use of an inanimate or stationary object or for the services of a person having a given occupation, (State v. Applegarth, 81 Md., 293), are merely a "compensation for facilities provided."

Huse v. Glover, 119 U. S., 543, 548;

Ouachita Packet Co. v. Aiken, 121 U. S., 444, 447.

Such services and facilities are regarded as materially *advancing* and *benefiting* commerce and, therefore, as being in no wise an obstruction, hindrance or *restraint.*

Atlee v. Packet Co., 21 Wall., 389, 393;

Packet Co. v. St. Louis, 100 U. S., 423, 427;

Vicksburg v. Tobin, 100 U. S., 430, 432.

A private contract on the subject is not open to criticism, though it may indirectly affect commerce among the States.

Railroad Co. v. Richmond, 19 Wall., 584, 589;

Transportation Co. v. Parkersburg, 107 U. S., 691, 699.

Matters Incidentally Affecting Commerce.

This distinction is recognized in many of the cases usually cited on this general subject.

Thus, the States "may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution," by acting "upon the business *through*

the local instrumentalities to be employed after coming within the State."

Hall v. De Cuir, 95 U. S., 485, 487, 488, 489.

Such local action "though necessarily, more or less, affecting interstate commerce," in a legal sense, does so only "incidentally."

Ouachita Packet Co. v. Aiken, 121 U. S., 444, 447;

Leloup v. Mobile, 127 U. S., 640, 649;

Kidd v. Pearson, 128 U. S., 1, 23.

Where the matter consists of a charge for services rendered "there is in such a transaction only *an exchange of money for its supposed equivalent,* * * *merely compensation for benefits conferred.*"

Sands v. Manistee River Imp. Co., 123 U. S., 288, 293–294;

Monongahela Nav. Co. v. United States, 148 U. S., 312, 332–333.

In Bowman v. Chicago etc. Ry. Co., 125 U. S., 465, it was distinctly declared that "the local instruments to be employed after coming within the State" constitute no part of interstate commerce, (486), and that local "regulations designed to *aid and facilitate commerce*" cannot be declared to operate as impediments thereto. (498.)

A tax on the earnings of a commission merchant realized out of sales of property *belonging to non-residents* is not taxation of interstate commerce. "If it can be said to affect such commerce in any way, it is incidentally, and so remotely as not to amount to a regulation thereof."

Ficklen v. Shelby County, 145 U. S., 1, 21, 24.

If the goods there in question had actually *been consigned to the commission merchant for sale generally*, and to any person who might desire to purchase them, and had been delivered by such commission merchant directly to the purchaser, there would have been no room for doubt or dissent. As shown by the cases

hereafter cited, the difficulty in that case arose from the fact that the goods were *in the State of the owner when sold and were shipped by such owner direct to the purchaser*, pursuant to a previous contract of sale.

A rental charged for the use of its streets by a city against a telegraph company—a Federal agency and engaged in interstate commerce—is not a regulation of commerce, but merely a compensation for property occupied.

St. Louis v. Telegraph Co., 148 U. S., 92, 97, 98.

Stock Yards have been judicially declared to find their closest analogy in grain warehouses.

Delaware etc. R. Co. v. Central Stock Yards Co., 45 N. J. Eq., 50; 46 N. J. Eq., 280.

Hence, the ruling of the Court, in disposing of the contention that the services of a grain warehouseman in storing, handling, cleaning, and elevating grain, which was at the very time the subject of interstate commerce, (particularly in the case of the floating elevator described in 143 U. S., at 529, 530), did not constitute a part of such commerce, but stood upon the same basis as *wharfage rates and the like*, is directly in point.

Munn v. Illinois, 94 U. S., 113, 135;
Budd v. New York, 143 U. S., 517, 545.

Applying this doctrine, a learned State court directly held that mere services rendered in and about property, though it be at the time the subject of interstate commerce, were not a part of such commerce.

Stone v. Yazoo etc. R. Co., 62 Miss., 607, 639, 640.

This ruling was approvingly cited here, and it is worthy of particular note that this phase of the matter has never been questioned in any of the earnest and elaborate dissents in the cases involving the validity of State legislation regulating the charges of warehouses, and the like.

Budd v. New York, 143 U. S., 517, 541, 542;

Brass v. North Dakota, 153 U. S., 391, 401.

In a still later case it was said that "the interference with the commercial power must be direct and not the mere incidental effect" of a contract made between a landlord and tenant, or principal and agent.

Erie Ry. v. Pennsylvania, 158 U. S., 431, 439.

This ruling was in terms reiterated in the most recent case on the subject.

Henderson Bridge Co. v. Kentucky, 166 U. S., 150.

This case is important as clearly drawing the distinction between the business done by persons engaged in commerce and who avail themselves of a given facility, and the occupation of a person, or aggregate body, *providing such facility*. The operations of the latter were held not to constitute interstate commerce, although the facility in question was a bridge across the Ohio river from Indiana to Kentucky. It was said that the charges of such bridge-owner affected commerce but remotely and incidentally, and that they did not so directly affect it as to infringe upon the Federal commercial power.

Henderson Bridge Co. v. Kentucky, 166 U. S., 150, 154.

The dissenting judges expressed the opinion that the effect of the decision was to "substantially overrule" the Covington Bridge case. While the distinction between the two cases is perhaps not fully elaborated, it is ventured, with due deference, that there is a clear one between a local law undertaking to regulate the tolls of a bridge erected under authority of *two* States and used by citizens of both alike, which is, in effect, an effort by one State to exercise jurisdiction *over property not wholly within such jurisdiction*, on the one hand, and, on the other hand, an exercise of the taxing power over the receipts from the use of a mere *aid or facility* to commerce, and affecting that

commerce only incidentally, though that commerce be interstate in its character.

These views were quite clearly recognized, even by the dissenting judges in the Henderson Bridge case; but they thought them inapplicable to the situation presented in that case. The present case, however, involves none of the difficulties which caused that division of opinion.

REVIEW OF COMPLAINANT'S CONTENTIONS.

The adjudged cases, in terms or in effect, dispose of the minor contentions of the complainant in this behalf.

a. The intention of the owner, in one State, to ship his live-stock to another State, is an immaterial consideration. The property does not become subject to the Federal power until the transportation thereof has *actually begun*, and remains so only while *that transportation is in progress.*

Coe v. Errol, 116 U. S., 517, 525, 528;
United States v. E. C. Knight Co., 156 U. S., 1, 13.

That transportation "ends after the stock is unloaded or delivered" *at the stock yards* to which it is consigned.

Covington Stock Yards Co. v. Keith, 139 U. S., 128, 136;
Myers v. Baltimore County, 83 Md., 385.

b. The purchaser of the live-stock, as such, is not engaged in interstate commerce, (Waring v. Mayor, 8 Wall., 110,) and that he intends, at the very time of his purchase, to transport the property to another State, and actually consummates his purpose, do not make the sale to him a transaction of interstate commerce.

Kidd v. Pearson, 128 U. S., 1, 21, 23, 24.

The subsequent sale, delivery or distribution of property which has once been the subject of commerce

between the States is an entirely new transaction, and does not, retrospectively, invest the previous sale witd any of the attributes of interstate commerce.

In re Greene, 52 Fed. Rep., 104, 112, 114;
United States v. E. C. Knight Co., 156 U. S., 1 13, 17.

c. In every instance, a sale is made in either Kansas or Missouri. The live-stock is not sold until after its arrival at the Stock Yards. Wherever the location of the property, and at whatever point or points the negotiations are carried on, *the contract of sale is completely entered into at some given point.* That place is the consummation of the contract and fixes its *lex loci*, as has been determined in the many recent insurance cases, of which Equitable Life Society v. Clements, 140 U. S., 226, 232, is the leading one. Every contract, in the very nature of things, is governed by the law of some one State. Such an anomaly as a contract subject to the laws of *no State*, but constituting, of itself, interstate commerce, has never been evolved, and cannot exist. (Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S., 397, 447). It certainly does not result from the fact that the property under negotiation happens to be at the time in another State, for that would withdraw a large majority of the commercial contracts of the day from the operation of the State statutes, which is a decisive consideration, (155 U. S., at 655; 156 U. S., at 16). It cannot be material that the negotiating parties happen to reside in different States, nor that the sale is made in one State and payment, or even delivery, in another. (Hall v. Cordell, 142 U. S., 116, 120, concerning Chicago Live Stock Exchange). Such subsequent act does not transform the transaction into one of interstate commerce. At most, "it is but the performance of an act rendered necessary by the provisions of *the contract already made.*"

Allgeyer v. Louisiana, 165 U. S., 578, 588.

d. Nor can it be said that every one who u[illegible]s or

refuses to use, or agrees not to use, the telegraph, or soliciting agents, thereby makes all his transactions the subject of interstate commerce.

e. As these defendants are not engaged in interstate commerce, in any view which can be taken of the matter, under the authorities already cited, it is probably unnecessary to undertake to mark out whether there are any particular or isolated transactions on their part which could be brought within the jurisdiction of the Court, even if the complainant were successful on the merits. However general the language of the statute, it can only be enforced as to interstate commerce. (Osborne v. Florida, 164 U. S., 650, 654, 655.) Though an injunction should issue it would have to describe, accurately and specifically, what transactions constituted interstate commerce. Where is the line to be drawn?

1 Beach, Injunctions, § 115.

The "Original Package" Doctrine.

The complainant undertakes to answer this all-important question by invoking the doctrine of the so-called "Original Package" cases. Upon their authority, it is urged that if live-stock shipped from a state other than Kansas is unloaded in that part of the yards located in that State, or, if shipped from a State different from Missouri, is placed in pens situate in the latter state, such stock is an "original package," and, consequently, an article of interstate commerce until sold and actually delivered to the purchaser, and that everyone connected with such sale or delivery, in whatever capacity, is engaged in interstate commerce and that his refusal to serve or a demand for a given compensation is a restraint on such commerce. As already shown, the "original package" doctrine has no application to *a mere service* rendered or facility afforded by a commission merchant or other agent. And, as a train-load, or even

a car-load, of live-stock, may be, and often is, sold in parcels to a number of different purchasers, it might be interesting, if necessary to a conclusion, to inquire whether each individual animal is an "original package" or whether the entire shipment is to be so characterized. 81 Fed. Rep., 997, 1000.

Here, neither the owners who ship, nor the railroads which carry, are members of the Exchange or parties to its rules. An owner may employ a broker, or not, accordingly as his interests move him. A railroad is not bound to deliver only to an Exchange-member. Even should a broker refuse to serve a given shipper, peremptorily and without any reason whatever, he could not be said to be restraining interstate commerce. That he refused to serve except upon certain terms, even though his position be influenced by his membership in an Exchange, could not convict him of restraining commerce: it would simply be denying the refusing shipper the benefit of the skill of the broker and of the benefits and facilities provided by the rules of the Exchange. Every failure to agree on terms cannot be held to be proof conclusive that commerce has been restrained.

However, it is interesting to note whether it is true that live-stock shipped to the Kansas City Stock Yards from another State remains an article of interstate commerce after being unloaded and offered for sale. The transaction is not in pursuance of a previous contract. The property is brought to market for the purpose of being offered for sale generally to any person who will buy the whole or any part of the consignment. The isolated instances of shipments *en route* to Chicago or elsewhere which are unloaded solely to the end that the animals may be rested, watered and fed, or in order to "test" the local market, are irrelevant to the present controversy; for with these the defendants do not seek to have any concern, nor do any of the rules or practices relate thereto. Equally irrelevant is the fact the

Department of Agriculture maintains an inspection bureau at these yards, for its operations are confined to an inspection into the soundness of live stock from Texas and other infected districts, *before it is unloaded* or placed in pens ready for sale, to-wit: before the *transportation* thereof has ceased.

The material inquiry is as to live-stock consigned to the Stock Yards in question, which has either passed inspection or which is not subject thereto, and which has reached its destination, so far as its then owner is concerned, and been delivered to the consignee to be offered for sale as other merchandise which has been imported from another State or a foreign country.

When Property Becomes Local.

This precise question has been several times decided by this Court, and it is of striking importance that however numerous and persistent the dissents in other cases on the general subjects of interstate commerce and "original packages," these adjudications have in every instance been *unanimous*.

The leading case proceeded upon this state of facts: Coal, mined and taxed in *Pennsylvania*, was shipped by the owner, residing at Pittsburg, by river to *New Orleans*, consigned to his *selling agent at the latter city*, to be there sold by him *on the owner's account*. The State of Louisiana levied a tax upon the property itself, *immediately upon its arrival at New Orleans and while still on the boats which had carried it from Pittsburg*. The tax was resisted as a burden on interstate commerce and the property was claimed to be still in its "original package."

After declaring that the disposition which a subsequent purchaser of the coal might make of it, by way of an export or its transportation to another State, was wholly immaterial, and that the only question was as to the status of the property before its sale or any action

in reference thereto, (629), the Court disposed of this question in language precisely and literally applicable to the strikingly parallel case now at bar: The action of the State of Louisiana, it was ruled, "was not a tax imposed upon the coal as a foreign product or as the product of another State than Louisiana, nor a tax by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was *in a state of transit* through that State to some other place of destination. It was imposed *after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans.* It might continue in that condition for a year or two years or *only for a day. It had become a part of the general mass of property in the State.* * * * Take the City of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey or from *the pastures and grain fields of the West?* * * * After their arrival within the State—*that being their place of destination for use or trade*—to tax them is not a regulation of interstate commerce."

Brown v. Houston, 114 U. S., 622, 632, 633.

It will be observed that Mr. Justice BRADLEY, who delivered the opinion in Brown v. Houston, was also the organ of the Court in Robbins v. Shelby Taxing District, 120 U. S., 489, so strenuously relied upon by the complainant. The opinion in the latter case, upon its face, draws the distinction we urge, with very great clearness. That case was placed upon the precise and specific ground that the tax upon the "drummer" in question was, in legal effect, a tax upon *the goods themselves*, while still in the hands of the owner *and beyond the jurisdiction of the State.* Brown v. Houston was referred to as distinctly deciding that "*as soon as the*

goods are in the State and become part of its general mass of property, they will become liable to be taxed," and it was then laid down that "*when goods are sent from one State to another for sale*, or, in consequence of a sale, *they become part of its general property, and amenable to its laws.*" (p. 497.) The difference lies in the effort "to tax the sale of such goods, or the offer to sell them, *before they are brought into the State.*" (497.)

In this stage of the authorities, Judge CALDWELL was called upon to determine the following case:

A manufacturer of stove ranges located at St. Louis shipped a carload of them to a point in Arkansas consigned to *himself.* They were removed from the cars and stored in a warehouse which had been rented for that purpose. One of the owner's agents employed to make sales was arrested for failing to pay a tax imposed by the Arkansas statute on such agents generally. Judge CALDWELL pointed out the distinctions established in the then recent cases decided by this Court:

"*The ranges were not sold before they were shipped. They were shipped into the State to be thereafter sold; and they were received by its agent, the plaintiff, and placed in the store-house for future sale.* It was from the ranges so stored in this State that the plaintiff made his sales and filled his orders. He was not a 'drummer' taking orders for ranges then out of the State, and to be thereafter shipped into the State. *He was selling the goods then in the State, as other merchants do.*"

Hynes v. Briggs, 41 Fed. Rep., 468, 470.

Shortly after this, Leisy v. Hardin, 135 U. S., 100, was decided, and it was at once claimed that, as a result of that opinion, Brown v. Houston stood overruled. This claim was negatived, and the distinction between them has been illustrated by several cases decided on the circuit.

Ex parte Brown, 48 Fed. Rep., 435, 438–444;
American Harrow Co. v. Shaffer, 68 Fed. Rep., 750, 756, 757;

Preston v. Finley, 72 Fed. Rep., 850, 860.

In a dissenting opinion delivered soon after Leisy v. Hardin had been determined, Mr. Justice BRADLEY, with the concurrence of Mr. Justice FIELD (both of whom were of the majority in Leisy v. Hardin) and of Mr. Justice HARLAN, (who had joined in the dissent in that case), reiterated that when property has been brought to a State "*for the purpose of ordinary use or sale*," it has acquired a local status.

Pullman's Car Co. v. Pennsylvania, 141 U. S., 18, 31.

In a very recent case, the supposed conflict between Leisy v. Hardin and such a case as the one at the bar was directly brought to the attention of the Court.

The owner of coal, residing at Pittsburg, shipped the same, in barges belonging to himself, to the State of Louisiana, for the purpose of being sold there or of being consigned thence to supply orders from other States. While the coal was moored at Baton Rouge, in the *original barges* in which it had been shipped from Pittsburg, it was subjected to a tax by the State of Louisiana. This tax was adjudged to be *valid* and not in violation of the interstate commerce clause of the Constitution. The barges had been consigned to the plaintiff's *selling agent at New Orleans*, and that agent, "not having yet made the necessary arrangements to receive or dispose of the cargoes of the vessels at New Orleans or elsewhere, the vessels, being about one hundred in number, were stationed and moored in the Mississippi river at a convenient mooring place about nine miles above the port of Baton Rouge, where they awaited the orders of the consignor's agent, to be thence navigated to such places as he might deem convenient or advantageous to the owner's interests."

Counsel for the petitioner undertook to distinguish Brown v. Houston on the ground that the coal in question had not yet reached its destination but was still in

transit. Their principal contention, however, was that Brown v. Houston had been overruled by subsequent decisions, "*particularly that in Leisy v. Hardin, 135 U. S., 100.*"

The opinion of this Court was *unanimous*. A series of previous cases were reviewed (587–8); *Brown v. Houston was fully stated and reaffirmed* (588–9); and the conclusion announced that "the property in this case, as in that, still belongs to the original owner in Pennsylvania, but is brought to Louisiana *for purposes of sale*, and is subject to taxation and sale as any other property of citizens of the United States is subject when it becomes incorporated into the bulk of the property of the country." (589.)

Pittsburg Coal Co. v. Bates, 156 U. S., 577.

Concurrently with this, the Court upheld a statute of Louisiana prescribing a compulsory measurement of the contents of all coal *brought into the State for sale*, saying that while the system prescribed might have an effect upon commerce, yet such effect was only *incidental* and *remote* and did not constitute *a regulation of commerce*.

Pittsburg Coal Co. v. Louisiana, 156 U. S., 590, 599.

The same conclusions are announced in the exhaustive opinion of Mr. Justice GRAY in Emert v. Missouri, 156 U. S., 296.

It is sought to distinguish this case by the assertion that it rested upon an exercise of the police power by the State. It deserves to be noticed that the Court was precise to uphold both the local *taxing* and the police powers. (311.) Indeed, the full jurisdiction of the State, in every respect and for all purposes, was adjudged. (322.) It does not occur to us to be a decisive consideration that a given case is devoted to a discussion, in whole or in part, of the police power of the State. Doubtless, cases do arise when the fact that the police power is being exercised as against interstate

commerce becomes an important consideration. These are usually the cases in which it is said that it must be an exercise of the police power pure and simple, a regulation for the protection of the health, safety or morals of the people, and not merely an attempt to create an obstruction to interstate commerce, or where the inaction of Congress has left the States free to legislate relative to certain matters.

Certainly, when it is held that a given person *is not engaged in interstate commerce*, that ruling establishes *that proposition* for all purposes, whatever the other points in the case may be.

A striking illustration of this is disclosed by comparing the cases of Covington Bridge Co. v. Kentucky, 154 U. S., 204, and Henderson Bridge Co. v. Kentucky, 166 U. S., 150. The former involved an exercise of the *police power*, and was decided *adversely* to the State, while the latter involved the right of *taxation* and the State was *successful*. Yet it did not occur to a single justice, in either case, to point out any such distinction. If there were one, the Covington case ought to have been free from doubt, and there would have been no occasion for the minority to assert, in the Henderson case, that the former had been "substantially overruled." (166 U. S. at 169.)

We insist, therefore, that the arguments, illustrations and conclusions so exhaustively stated in Emert v. Missouri have full application to the status of these defendants, at least in respect of the question under consideration. There, the Singer Manufacturing Company, engaged in making sewing machines in New Jersey, employed Emert as its selling-agent in Missouri. The machines were shipped to him, and he was to sell them *for and on account of the company*. He offered them for sale in *the same condition as when received*, and while they were still the property of the New Jersey producer. His counsel insisted that he was selling "original packages" and that he was engaged in inter-

state commerce, precisely as if his principal had made the sales in New Jersey for delivery in Missouri, or had been present in person when the sale and delivery were consummated, (301–306). The Court said of these contentions: "There is nothing to show that he ever offered for sale any machine which he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another; and *were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce.*" (311.)

The illustration of Mr. Chief Justice MARSHALL, that an auctioneer employed to sell an "original package" was not engaged in interstate commerce, was approvingly quoted, (313); Woodruff v. Parham was reaffirmed, (314); Welton v. Missouri, Cook v. Pennsylvania, and similar cases were shown to rest upon the ground of State *discrimination*, (315, 316); Brown v. Houston was fully stated and the language hereinbefore set out approvingly quoted, (317); Robbins v. Shelby Taxing District was shown to proceed upon the very distinction we have indicated, (318, 319), namely, that the goods were at the time of the State interference "*in another State*" and had not been "*brought within the jurisdiction of such State for the purpose of being sold.*" Leisy v. Hardin, Brennan v. Titusville, and similar cases, were reviewed; and that these were correctly distinguished is shown by the fact that the opinion was *unanimous*, and concurred in by the very Justices who wrote the opinions in those cases.

Emert v. Missouri, 156 U. S., 296.

MANNER OF CONDUCTING DEFENDANTS' OCCUPATION.

The allegations of the bill of complaint disclose a labored effort to bring the acts and purposes of the defendants and of the Exchange to which they belong,

within the domain of the congressional enactment. It is a decisive consideration that the defendants are not *dealers;* they neither buy live-stock, as purchasers, nor sell the same, as vendors; nor are they engaged in transporting the same. They are merely agents, selling, and, sometimes buying, for and on behalf of others, for a commission. (White v. Brownell, 2 Daly, 329, 337). They render personal services merely. Their commissions are earned when the services have been performed. A broker (though belonging to an Exchange) is simply an agent to transact business, not for himself, but for others. He is a middle-man, a negotiator between other persons for a compensation; and so this Court has directly decided in reference to this precise occupation (Union Stock Yards Bank v. Gillespie, 137 U. S., 411, 415, 419). That service is neither interstate in its character, nor does it constitute commerce in the sense in which that term is used in the Federal Constitution. And the Exchange, as such, is not engaged in business or commerce of any kind whatever, local or interstate. "The rules of the Exchange are merely machinery for bringing the two parties together." (Bowsing v. Shepherd, L. R., 6 Q. B., 309, 327).

A broker having his office in Missouri who sells cattle located in Kansas does not thereby engage in interstate commerce. The fact that pending negotiations for such sale, the cattle may, for the convenience of the Stock Yards Company, be moved from one State to another does not affect the situation.

Lehigh Valley Railroad v. Pennsylvania, 145 U. S., 192, 200 *et seq.;*

Seawell v. Kansas City etc. Ry. Co., 119 Mo., 222.

How can it be said that mere brokers, whose only connection with the property is to perform a mere act of agency in finding a purchaser, are "directly commerce itself," in contradistinction to being mere *aids* to

commerce, merely incidentally affecting it, and only indirectly related thereto?

Does the employee who feeds the cattle at the yards, or the weighmaster who weighs them, transact interstate commerce? Or the banker who pays the check or draft given in payment for the cattle raised and shipped from Kansas, but sold and delivered to the purchaser in Missouri?

These inquiries point the distinction between interstate commerce and matters of merely domestic concern,—a distinction which, as already indicated, "*has always been carefully preserved and is clearly defined by the authorities.*" The language of this Court also supplies a decisive answer to the inquiries above suggested: "If the power to regulate interstate commerce applies to all incidents to which such commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between States, and would exclude State control over many contracts purely domestic in their nature."

Hooper v. California, 155 U. S., 648, 655;
United States v. E. C. Knight Co., 156 U. S., 1, 16.

The Views of the Circuit Court.

The Circuit Court correctly stated the question to be, as applied to the pleadings and facts before it, "*Is the business in which the defendants are engaged, commerce between the States?*"

After holding the accidental location of the Stock Yards on both sides of a State line to be wholly immaterial, it answered the question above propounded, in the affirmative upon these grounds:

a. Live stock shipments are solicited by traveling employees from owners resident in other States. Fre-

quently loans are made to such owners secured by chattel mortgage. A consignment having been made, the consignor often draws on the consignee with bill of lading attached, and the proceeds are in various ways disposed of as directed by the owner. The broker is also on the alert for purchasers and sells without regard to the ultimate destination of the consignment, it being at times re-shipped to other markets, but principally used in the neighboring packing houses.

A number of approved definitions of the term interstate commerce were quoted, from which it was concluded that *State legislation* in reference to local brokers employed to sell such live-stock, limiting the number of solicitors, regulating telegraphic communication, and providing for discriminations in rates of commissions, would be invalid as prohibited regulations of interstate commerce,—a conclusion at not all warranted by the cases cited, nor involving by any means an accurate test, and based on an assumed state of facts far different from those shown by the Record. If such regulations by means of State legislation, were unconstitutional, this would be because, as to a private occupation, the statute would be in violation of *the Fourteenth Amendment;* and for the same reason, Federal legislation to the same end, by Congress or by means of an injunction, is violative of *the Fifth Amendment.*

Certainly the Munn and Budd cases cited by the Court, support no such conclusions as it announced under this head, but *do* uphold legislation of this very character as not infringing upon the Federal commercial power. The only fair test is, would an agreement between partners or a by-law of a business corporation that no solicitors, or only a given number of them, should be employed; that *prepaid* telegrams should not be sent soliciting business; and that fees or commissions would be shared with others engaged in the same business elsewhere who should invoke the services of the local party, be an invasion of the commercial power of

Congress? There is a marked distinction in this respect between State legislation and a *private contract.*

Railroad Co. v. Richmond, 19 Wall., 584, 589.

It was glaringly inaccurate to say that the rules provided for "a *discrimination in rates* (of commission) for handling stock shipped from different localities outside of the State." The provision on the subject is section 8 of Rule IX., (Record, 43, 44), which refers solely to dealings with *commission merchants located at other cities*, and regulates the very common practice which prevails between persons exercising occupations —(probably more so among lawyers than in any other instance)—of dividing fees or commissions flowing from business forwarded by one to the other. Such division is permitted when live-stock is shipped direct to non-resident commission merchants from one of the markets named. A note to this rule shows that it has thus been officially construed. For palpable reasons, this is by no means the same as State legislation *intentionally discriminating* against the products of another State. (Merchants' Bank v. Pennsylvania, 167 U. S., 461). In view of the court's conclusion, it is remarkable that the bill in this case does not even question the rule's validity, nor the injunction specifically prohibit its continued enforcement.

It would be somewhat startling if a lawyer at New York, for good business reasons, should send a case to a professional brother in Kansas for attention, that an agreement to divide fees could not be lawfully entered into. And equally so to say that because the Kansas lawyer kept *all the fees* collected from his ordinary clients, but *divided fees* with counsel sending business from another State, *he thereby discriminated against his neighbors, and violated the Act of Congress.*

b. After holding that under the Trans-Missouri case, contracts concerning aids to commerce, consisting of mere personal services, were within the Act of Congress, the status of the defendants was distinguished

from local incidents to commerce upon these grounds: "They are *active promoters*, and frequently interested parties in this immense traffic. They reach out over many States and Territories, by their solicitors and advertisements and gather in for sale and slaughter millions of cattle, sheep and hogs, and their rules and regulations cover the entire business and extend over the whole field of operation."

This statement was followed by a indiscriminate citation of most of the cases relied on by the defendants, running from Packet Co. v. St. Louis, 100 U. S., 423, to Henderson Bridge Co., 166 U. S., 150, as being "in point."

1. The Trans-Missouri case does *not* hold that contracts concerning "only an aid or incident to commerce, something in the nature of personal services," to quote the circuit court, fall within the Act of Congress; on the contrary, it indicates *the very reverse* as plainly as the English language can do so. A local commission merchant is far different from an interstate railroad whose transactions are "commerce itself," *ipso facto.*

2. The defendants are beyond all doubt "*active promoters*," and while this is proof conclusive that they do not *restrain* commerce, it has no bearing to negative their status as mere incidents to commerce. The *indolence* or *activity* of a person in exercising his vocation does not affect the question whether he is engaged in interstate commerce. Doubtless, many exceedingly inactive persons are so engaged. Whether the extent of the business be great or small is, in this respect, equally irrelevant.

3. The "frequent interest" mentioned refers to the fact noted that many loans are made by commission merchants to owners of live stock, secured by chattel mortgage and repaid out of the proceeds of sale. This element of interest was present in Woodruff v. Parham, 8 Wall., 123, and in many of the cases following it. The circumstance is wholly irrelevant: that a party

holds a chattel mortgage on property in another State has no tendency to stamp him or the mortgagor as being engaged in interstate commerce. Would a State statute on the subject of such mortgages—regulating the matter of acknowledging or recording them, or prohibiting certain clauses therein, forbidding the employment of solicitors or the sending of prepaid telegrams to induce persons to make them,—be a violation of the Federal Constitution?

4. That the defendants request employment by means of solicitors or advertisements sent to other States is equally without point. The statement means that those commission merchants who employ no solicitors and who do not advertise, are *local*, while a mere resort to such means for attracting custom would place them *beyond State control*, free from local license fees, and subject to Federal regulation. If every person who advertises in or sends solicitors or prepaid telegrams to other States, thereby engages in interstate commerce, few business vocations can be regulated as local agencies.

Many startling assertions have been made on the subject of interstate commerce since the question first came before the courts; but if any of them have been more irrelevant than the conclusions below on this phase of the question, no trace of it is to be found in the books.

c. The statement that several of the rules involved "have more than a local operation and extend beyond State lines" again refers to the provisions concerning solicitors and prepaid telegrams, which have been already considered.

d. It is asked, "Does this live stock, once upon the stream of commerce, cease to be such when unloaded at Kansas City?"

Brown v. Houston was distinguished because it was said that there the property had reached it destination and was offered for sale in great or small quantities,

to suit the purchaser. There is in point of fact no such difference between the facts of that case and of this. Here, too, the only live-stock with which the defendants and their rules are concerned, is that which is *actually sold at Kansas City*. That which is unloaded merely to be watered or fed *en route*, or not sold there because the prevailing prices are unsatisfactory, is not subject to a commission charge, non-trading rule, or any of the other regulations of the Exchange.

So, too, live-stock may be sold at Kansas City "in great or small quantities to suit the purchaser," and the very object of offering it is that some member of the public generally shall become the purchaser, in whole or in part. Whether to sell the first day, or to hold until better prices prevail or some temporary depression passes away, are business problems, and the probability that the parties will decide them this way or that does not bear upon the question whether they are engaged in interstate commerce. The coal involved in the Louisiana cases might have been sold in barge-load lots, for local use or for reshipment, immediately or when prices became satisfactory.

The decisive element which applies to all live-stock to which the defendants' rules have the slightest bearing, is that such live-stock has reached its *destination*, its transportation has *ceased*; it has been unloaded *for purposes of sale*. That now and then isolated shipments are not sold but shipped to another market may bear upon the status of *that shipment*, if it can be said that an undisclosed conditional intention is a decisive consideration, but does not impress upon *all* live stock received at Kansas City the same interstate commercial characteristicts.

e. The provisions of sections 4386–7 of the Federal Revised Statutes requiring railroad companies to unload live stock from time to time in the course of transportation, in order that it may be fed, watered, and rested, are equally foreign to the case.

f. The Government inspection of certain live stock, *before it is permitted to be unloaded and offered for sale*, does not prove so grave a violation of the Constitution as would be shown by the assumption that live stock not subject to inspection, or which has been inspected, remains under Federal control *after being unloaded and offered in the market to purchasers generally in such quantities and at such prices as may be mutually agreed on*, and especially not, that every person *who renders services in and about negotiating a sale*, and in feeding, watering, or weighing such live stock while at the yards, is thereby made to engage in interstate "commerce *itself*," or that his charges for services thus rendered, or even refusals to serve unless thus compensated, constitute restraints of commerce among the States.

THE TERMS OF THE INJUNCTION ORDER.

The injunction order goes even further than the opinion on this subject. It embodies these definitions of interstate commerce: All services or transactions concerning live stock received at the Kansas City stock yards "from other States and Territories *for sale there* or for further transportation to other States or to foreign markets. * * * Live stock shipped from one State or Territory *for sale or disposition* in another State or Territory." (Record, 277, 278.)

That services in negotiating a sale were necessarily local, and that their effect on interstate commerce was, at most, incidental, was denied. Property was adjudged to be still a portion of commerce among the States after its arrival at the stock yards "*for sale there.*" If the added clause meant to attribute a similar status to live stock *intended to be further transported after having been thus sold*, it is in direct conflict with Coe *v.* Errol, Kidd *v.* Pearson, and United States *v.* Knight Co., *supra.* If that clause had reference to live stock which was merely unloaded *en route*, for the purpose of being watered, fed, and rested, it was wholly irrelevant,

for, to repeat, as to such stock the rules and operations of the exchanges are wholly without application: there is no charge of a commission and no dealing or refusal to deal as to such stock.

If, however, it should be concluded that, now and then, a transaction is disclosed by the record in respect of which the defending exchange falls within

the jurisdiction of Congress that transaction gives rise to the proposition that:

II.

THE ACT OF CONGRESS WAS NOT INTENDED TO TRANSFORM THE MANY EXCHANGES EXISTING IN THE UNITED STATES INTO UNLAWFUL COMBINATIONS AND THEIR MEMBERS INTO CRIMINAL OFFENDERS.

In February, 1790, on the day fixed by the Judiciary Act of 1789, the Supreme Court of the United States opened its first term in the ROYAL EXCHANGE in the City of New York. (Carson, Hist. Supreme Court, 150). At the Centennial Celebration of this memorable event, held in February, 1890, this fact was repeatedly referred to, (Carson, 581, 594), and it was embodied in the account of the proceedings which was appended to 134 U. S., at 711.

The basis of the present proceeding is that Congress, in that Centennial year, enacted that such bodies as the one under whose auspices this august tribunal held its first session should thenceforth be outlawed as combinations to restrain the trade of this land and as monopolies fraught with injury to the public interests. The contention is that the Exchange thus honored and recognized (by the strongest implication), and its successors and followers, have become unlawful conspiracies and its members amenable to criminal prosecution.

The precedent of favorable recognition on the part of this Court is supported by its judicial utterances:

In Bibb v. Allen, 149 U. S., 481, (May, 1893), "the statutes of New York under which the New York Cotton Exchange was organized, together with *the rules and regulations of that body*" formed a part of the record. A review thereof at a subsequent page of this brief will disclose the presence of provisions in that contract rendering the organization subject to the con-

tentions of the Government in the present case, and among the items there sued for was one for $750 in *commissions*, as fixed by the rules. The opinion of this Court was delivered by Mr. Justice JACKSON. In view of his then recent critical examination of the Act of July 2, 1890, in the Greene case, 52 Fed. Rep., 104, (August, 1892), it is impossible to escape the conviction that if that Act had been supposed to have the slightest application to Exchanges some notice would have been taken of the circumstance. Yet, it was adjudged "that THIS COTTON EXCHANGE WAS A LAWFUL BODY, ORGANIZED FOR LAWFUL BUSINESS PURPOSES, and had power to make such rules and regulations as might be deemed necessary and proper to carry out the purpose of its organization" (489).

In Hansen v. Boyd, 161 U. S., 397, (1896), the rules of the Chicago Board of Trade (hereinafter summarized) were read in evidence (403), the suit being, in part, to recover the commissions prescribed by those rules. Bibb v. Allen was approvingly cited and a charge by the trial court that "there is nothing in *these rules, on their face, that indicates that they are* * * * *contrary to public policy*" was neither excepted to nor criticised by this Court (406).

The important case of Texas & Pacific Railway v. Interstate Commerce Commission, 162 U. S., 197,(1896), had its origin in complaints made by a number of these organizations, (200),including the Commercial Exchange of Philadelphia, referred to in detail, *post*. By the strongest implications, the lawfulness of such associations, was conceded by Mr. Justice SHIRAS, speaking for the Court (215), and their right to be heard, (*in equity* at that), in matters so vitally affecting the commerce of the country, was warmly affirmed by Mr. Justice HARLAN, dissenting (241, 252).

It may, therefore, be fairly said that, in substance, the contention of the complainant is that such rooms as the one in which this Court held its first session have

become the theatres of criminal operations, *per se*, and that the several associations reviewed and so favorably characterized, in at least three well-considered cases decided since 1890, ought, instead, to have been stamped as unlawful combinations, conclusive proof of which was published to the world in their rules and regulations, embodied in full in two of the records reviewed by this Court. It follows that the Court is in effect, asked to overrule its own recognition and adjudications concerning these bodies in the past. Our position is,—in full harmony with the necessary result of the cases referred to,—that the welfare of the public and the interests of commerce demand that the logical consequence of what this Court has said on this subject in the past shall be formulated by way of a direct adjudication in commendation of the regular or typical American Commercial Exchanges and Boards of Trade; and for these reasons:

From the earliest days of the Republic, it has been recognized that commerce, a department in which it is the chiefest ambition of our people to attain pre-eminence, can only be successfully carried on by the aid of proper facilities and the service of particular agencies, animate or inanimate. The distinction between obstructions, impediments, hindrances and restraints, on the one hand, and aids, benefits and advantages to commerce, on the other, has been many times recognized. It has been pointed out that certain matters constitute an "increased facility" (Passenger Cases, 7 How., at 403), which may consist of "services rendered," (State Freight Tax Case, 15 Wall., at 278). "A charge for services rendered or for conveniences provided is in no sense a hindrance or impediment to free commerce;" but these are "facilities to commerce rather than hindrances to its freedom," and charges therefor are not "*restraints* of commerce," whether imposed by "a State, a municipal corporation, or a private individual."

Packet Co. v. Keokuk, 95 U. S., 80, 84, 85, 87, 88;

Huse v. Glover, 119 U. S., 543, 550.

"It is a doctrine too well settled, *a practice too common and too essential to the interests of commerce* to admit of a doubt, that for the use of structures, erected by *individual* enterprise, or recognized everywhere as private property, a reasonable compensation can be exacted."

Cannon v. New Orleans, 20 Wall., 577, 582;
Atlee v. Packet Co., 21 Wall., 389, 393.

Again, such services "materially *advance*, and do not obstruct or burden, trade;" they are "in *aid*, and not a hindrance, of commerce," and are rendered "for the *benefit* of those engaged in commerce," and "for the *convenience* of trade and commerce."

Packet Co. v. St. Louis, 100 U. S., 423, 427, 429;
Vicksburg v. Tobin, 100 U. S., 430, 432;
Head Money Cases, 112 U. S., 580, 596;
Sands v. Manistee River Imp. Co., 123 U. S., 288, 293.

That Exchanges are to be thus classed is disclosed by the definitions which are given by standard lexicographers:

BOARD OF TRADE—"An association of business men, established in most large cities, for *the furtherance of commercial interests*, the enactment of *rules for the regulation of trade*, and the consideration of legislation affecting banking, insurance, railroads, customs, etc.; a chamber of commerce." (Century Dictionary).

Also, 26 Am. & Eng. Ency. Law, 227.

CHAMBER OF COMMERCE—"A voluntary association of the merchants and traders of a city or town for the protection of their commercial interests." (Century Dictionary);

"A board *to protect the interests of commerce*, chosen from among the merchants and traders of a city." (Imperial Dictionary).

As will be shown, "there is not a city or large town in the United States" where such organizations do not

exist; and "the long acquiescence" in the universally accepted conclusion that "Exchanges have become *of incontestable value to the public*," (Dos Passos, Stock Exchanges, Preface, IV.; Biddle, Stock Brokers, p. 40,) and the fact that they have "attained a position *not inferior in influence and importance to any of the distinctive adjuncts of this commercial age*," (Bisbee & Simonds, Produce Exchanges, Preface VI.,) demonstrate their "absolute necessity" and presents an "argument almost conclusive in favor of their rightful existence."

Packet Co. v. Catlettsburg, 105 U. S., 559, 563.

RULES FOR CONSTRUING THE ACT OF CONGRESS.

In determining the proper construction of the statute courts take judical notice of the history of such bodies, their manner of doing business, the results of historical investigations, and data and information disclosed by standard statistical compilations.

Suth. Stat. Const., Sections 300, 301, 306;
Moore v. American Transp. Co., 24 How., 1, 38;
Pacific Express Co. v. Seibert, 44 Fed. Rep., 310, 318.

If this investigation discloses an antecedent policy favorable to the enterprise in question, a departure from that policy will not be presumed.

Suth. Stat. Const., Section 321;
U. S. v. Fisher, 2 Cranch, 358, 390;
State v. Finch, 37 Minn., 433, 435;
State v. Reid, 125 Mo., 43, 57.

These views were applied in considering the legality of the rules of the New Orleans Cotton Exchange on the very subject of commissions.

Conners v. Robertson, 37 La. An., 814, 820.

It is to be noted that this Act does not undertake to *regulate* Exchanges, but, if it means what the complainant claims, Congress intended thereby to *destroy* them. In that view, and even when dealing with a case

of a Chinese merchant under an Act of Congress *specifically designed to limit the immigration of that race*, it was said: "We cannot believe that Congress intended to forbid to Chinese merchants, not only their own customs, *but the customs of merchants wherever trading is practiced.* * * We are asked to attribute to Congress *an intention to change the business methods of many people*, and to compel them to adopt inconvenient, and maybe impracticable ones."

Lee Kan v. United States, 62 Fed. Rep., 914, 918, (C. C. A.)

In such a case the courts are careful to remember that "a mere adherence to the letter, without reference to the spirit and purpose, may in this case mislead, as it has misled in other cases," (Packet Co. v. Keokuk, 95 U. S., 80, 87), and, accordingly, hold that, however broad the language of a statute, it will not be applied to matters "which *the whole history and life of the country affirm could not have been intentionally legislated against.*"

Holy Trinity Church v. United States, 147 U. S., 457, 472.

"Commerce, in its largest sense, must be taken to be one of the most important subjects of legislation, and an intention to *promote and facilitate it*, and not to *hamper and destroy it*, is naturally to be attributed to Congress."

Texas & Pac. Ry. v. Interstate Com. Commission, 162 U. S., 197, 218, 219.

For nearly seven years after the passage of the Act no step was taken to enforce it against Exchanges. Many suits have been brought and prosecutions instituted from which the general understanding of the Act can be readily gathered. Hundreds of Exchanges have existed and transacted large volumes of business, day after day, during all that period. Their places of business are conspicuous and usually in the very heart of the lo-

cus of the trade to which they respectively relate. The quotations of their transactions constitute a large part of every newspaper in the land. In view of these and other cognate considerations, the contemporaneous exposition of the statute and the long acquiescence in the legality of the existence of these bodies, are entitled to great force. This is especially true because since the Act was passed many new Exchanges have been organized; numerous memberships have been acquired, oftentimes at much expense; and large sums invested in improvements.

Endlich Int. Stat., Secs. 357, 358, at p. 503;
Hahn v. United States, 107 U. S., 402, 406.

THE ACT OF CONGRESS WAS NOT INTENDED TO DESTROY EXCHANGES.

In the light of the established rules governing the subject it must be concluded that there is nothing in this Act of Congress to warrant the construction that it was intended thereby to transform the many Commercial Exchanges throughout the land into criminal conspiracies. Such Exchanges have existed for centuries in all commercial centers. They have been created into corporations by special charters. General laws have been passed specifically providing for their incorporation, in most of which the *promotion* of trade was recited as the end in view. For illustrations, see

1 Thompson Corp., Sec. 146.

So section 1156 of the General Statutes of Kansas of 1889, (Vol. 1, p. 368), provides that "the purposes for which private corporations may be formed are: * * * Thirty-seventh. The organization and maintenance of Boards of Trades and Business Exchanges." By section 2771 of the Revised Statutes of Missouri of 1889, corporations may be formed "to erect Exchange buildings," and by section 2806 such corporations, in cities

having more than 35,000 inhabitants, are vested with the power of *eminent domain!*

Many, including the greatest of them, such as the London and New York Stock Exchanges, exist as unincorporated associations, resting upon voluntary contracts between their members. At the time of the passage of the Act of Congress there were one or more such Exchanges in every city in the Union which was known or recognized as a trade center with reference to a given commodity, whether grain, cotton, sugar, stocks, oil, mining products, lumber, or live-stock, (Century Dict. Tit. Exchange). Similar organizations also existed in reference to manufactures, the arts, and various professions and branches of labor, skilled and unskilled. It will be shown that whether incorporated or voluntary, such an Exchange as this had not only received the commendation of the Courts and economic authorities and been accorded favorable recognition by every department of government, but that no one had ever hinted that they were of an illegal character or inimical to considerations of public policy.

It is now urged, for the first time, that such organizations are conspiracies; that membership in them is a crime; and that their property is subject to forfeiture. Controversies without number affecting the status of such organizations have been before the courts. Members subjected to discipline, by way of fine, suspension, or expulsion, and strangers who were affected by some of the rules of a given Exchange, have many times brought these bodies before the courts. Every attack which the ingenuity of eminent counsel could devise, or the animosity of angry minds. could suggest, has been vigorously pressed. If any one has ever claimed what is contended for here, no trace of it has gone into the books; certainly no judicial sanction has been given it. "The silence of the books is very significant" and "is strong evidence." (FRY, L. J., in 23 Q. B. D., at

627, 630; Venable v. Wabash Ry. Co., 112 Mo., at 125).

Even in the exceedingly bitter litigation between Greer, Mills & Co. and this Exchange, of which this proceeding is the outgrowth (for the present bill is verified by a representative of that firm), and as recently as November 6, 1896, Judge PHILIPS noted that the very learned counsel then representing the complainant did not contend "that the limitations in the articles of agreement and by-laws fixing a *minimum commission* at which any member shall sell live-stock shipped to this market, and prohibiting its members from conducting such business 'on the outside,' are in *restraint of trade*, or tend to create a *monopoly*." (Greer v. Stoller, 77 Fed. Rep., 1, 7).

It is proposed to show that provisions fixing minimum commissions, regulating conditions of membership, limiting the privileges of membership to members in good standing, prohibiting dealings with non-members, and, generally, the other matters mentioned in the present bill, have been conspicuous features of *every trading Exchange in the world*. They are precisely the matters one would naturally expect to be covered by the rules of such a body. The differences are in the main merely verbal, or because the course of business regulated thereby has, in certain respects, distinguishing features. The aggregate value of the membership in these various bodies runs into the millions. In many instances, they own valuable property, consisting of Exchange buildings and the like. They are among the best known institutions in their respective localities. Some of them have a world-wide reputation and their existence is familiar knowledge to the most illiterate. Their transactions run into countless millions every year.

It is a fact, also, that these Exchanges all bear the same characteristics which are here denounced as evidencing a purpose to restrain trade and to monopolize

a given branch of trade. Indeed, the provision *limiting the privileges of the Exchange to members* and making membership optional with the body, is the leading one in all such organizations.

The rule on this subject, it has been judicially determined, is "not only reasonable, but *essential to the preservation of the Exchange* and the protection of its members; for it would be *destructive of such institutions* if persons who never were members, or who, having been members, had ceased to be such, were permitted, *under any pretense*, to utilize its premises or to enjoy its facilities."

McQuillen v. Real Estate Exchange, 39 N. Y. St. Rep., 426; 15 N. Y. Supp., 206, 207.

It is *that provision which must be held to be illegal.* All else is mere detail. For if a body can be formed from which all but members may be excluded at will, it must necessarily follow that it can *regulate the business conduct of its members*, and in doing so, prescribe minimum charges for services, prohibit dealings with non-members, and do all other lawful acts which will further the interests of the associates and thereby injure their competitors, for "the effort of all competition is to drive out all other competitors." (70 Fed. Rep., at 388.)

The various rules and regulations have at all times been publicly known. Those of many of the bodies had been published in full, not only in pamphlet form, but in legal treaties, economic discussions, and judicial reports, for many years prior to the passage of the Act of Congress in question.

Applying established rules of construction, can it be fairly argued that Congress intended to declare hundreds of bodies to be unlawful combinations, when no court of recognized authority had ever denounced them as such, and when, by the common voice and consensus of intelligent thought, they had been regarded in every age and in every land as most valuable *aids* to commerce?

Or that it intended to transform thousands of the best citizens of this Republic,—best in private character and best in their efforts to increase the commerce of our country and thereby its wealth and its importance among the nations of the world,—into common criminals, subject to imprisonment for continuing the transaction of their lawful business in the manner sanctioned by the experience and approval of centuries.?

Or, that organizations which the several States authorize to exist as corporations were to be stamped as criminal conspiracies in the Federal jurisdiction?

Or, that memberships, and the privileges incident thereto, representing investments and an actual value aggregating many millions, should not only be rendered valueless, but that ownership thereof should be conclusive proof of criminality?

Or, that the magnificent structures belonging to these bodies, and which adorn so many of our cities, should be no longer utilized for the purpose for which they were erected?

"Associations are so common an element, not only in commerce, but in all the affairs of life, that it would be rather perilous on the part of the court to assert that they impair competition, destroy emulation, and diminish exertion. There is scarcely an occupation of life, scarcely a branch of trade, from the largest to the smallest, that does not feel the existing and invigorating influence of these wonderful instrumentalities."

Jones v. Clifford, 5 Fla., 510, 515.

The bill in the present instance discloses, in its allegations designed to make out a case of interstate commerce, and to establish that the Kansas City Stock Yards constitute a public market, that "*vast numbers* of cattle, hogs and other live-stock are received annually at said stock yards," and that the same, "next to Chicago, is *the largest live-stock market in the world.*" In view of the subsequent allegations that all commission merchants at Kansas City are members of the de-

fending Exchange, and that some one of them is employed to negotiate every sale at that market, the complainant, out of its own mouth, has conclusively established that this so-called "conspiracy in *restraint* of trade" has succeeded, in a measure heaping-full, in accomplishing what its members claimed would result from its establishment: *the promotion of trade.*

Again, it is alleged that among other practices indulged by these alleged conspirators to restrain trade, is one "to *advance large sums of money* to stock-growers and owners of cattle, so that the owners of said live stock may have *the means to feed and prepare it for market.*" It is to be regretted that the bill does not disclose wherein this practice is calculated to *restrain* trade. There ought to have been a disclosure on this point, especially as the allegation is followed by others to the effect "that *ninety per cent.* of the members of said Live Stock Exchange *make such advancements* of money on live stock, and the *large* and *growing* market for live stock at Kansas City is *largely sustained by means of the money so advanced* to cattle-raisers by the defendants herein and their associates"! As "by their fruits ye shall know them," it stands alleged that this "conspiracy" has been and continues to be a *great public benefactor* and the most potent agency for *developing* trade of which the annals of commerce disclose a trace; for the body is but *ten years old!*

Exchanges Officially Recognized.

In and prior to 1890, the existence of these bodies was not only well known to the commercial world, to the courts, and to the various State legislatures, but they had been many times brought to the notice of Congress and the various executive departments. The indices to the Congressional Records, covering the period since 1865, disclose many petitions or memorials in favor of and remonstrances from them against

certain proposed legislation, including Live Stock Exchanges. The reports of Committees indicate that these bodies have constantly been consulted and their officers examined as witnesses. Special Committees, for instance, the one appointed on motion of Senator Vest to examine the alleged combination of packers to control the prices of meat products,and the one appointed under a resolution introduced by Senator Peffer to investigate the causes for the decline in the price of wheat, have not only had meetings in Exchange Buildings,but have examined into their workings and operations. The debates on various measures, especially the numerous ones concerning the so-called Anti-Option bill, proceeded, in a large measure, along the lines of familiarity with the extent of the dealings carried on under the rules of various Boards of Trade.

Of these publications and others referred to, *post*, judicial notice will be taken.

Jones v. United States, 137 U. S., 202, 214–216;
Heath v. Wallace, 138 U. S., 573, 584.

The Interstate Commerce Commission was instituted in March,1887. Exchanges have many times appeared before that body as complainants against railroad companies and were so reported to Congress, and the commission has held many of its meetings in Board of Trade buildings.

Thus, in the First Annual Report of that Commission (1887) the following Exchanges are mentioned: Atlanta Chamber of Commerce, p. 46; Clarksville Tobacco Board of Trade, p. 54 (as to which see 91 Tenn., 64); Memphis Cotton Exchange, p. 55; Boston Chamber of Commerce, pp. 102, 103; New Orleans Cotton Exchange, p. 110; and several others, pp. 54, 55, 58.

In its Second Annual Report (1888), the following are noted: Boston Chamber of Commerce, p. 108; Detroit Board of Trade, twice, pp. 127, 149; New Orleans Cotton Exchange, p. 129; Milwaukee Chamber of Commerce, twice, p. 153; Philadelphia Commercial Ex-

change, four times, p. 154; New York Produce Exchange, p. 156; and Chicago Board of Trade, twice, p. 162.

The Third Annual Report (1889), disclosed these appearances as complainants: New York Produce Exchange, twice, pp. 132, 146; Milwaukee Chamber of Commerce, three times, pp. 143, 144; Philadelphia Commercial Exchange, four times, pp. 143, 145; Chicago Board of Trade, three times, pp. 155, 166; New Orleans Cotton Exchange, three times, pp. 169, 171, 179; Toledo Produce Exchange, p. 174; and Detroit Board of Trade, p. 174.

These three reports had been *transmitted to Congress* and printed before the passage of the Act of July 2, 1890, and as related to the kindred subject of interstate commerce, they were presumptively consulted in the preparation and enactment of the statute referred to.

So, too, the Chief of the Bureau of Statistics of the Treasury Department had, in June, 1889, published a long list, embodying date of organization, number of members, names of officers, and manner of publishing reports of the respective Exchanges named. This list was published as an official document of the Treasury Department as "Statement No. 47 of Quarterly Report No. 3, Series 1888–89," and transmitted to Congress as a portion of the report on Internal Commerce accompanying the report of the Secretary of the Treasury for 1889, and printed accordingly.

In this report the data mentioned are given in connection with practically every Exchange which had been organized prior to 1887. As Live Stock Exchanges were first formed in this last mentioned year, and had not become prominently known when the report was made, there is no reference to them. But the various Stock, Produce, Grain, Cotton, and similar Exchanges, which are in all essential particulars identical with organizations devoted to Live Stock interests, are all included, and a statement made showing the annual

reports were in the hands of the Bureau. These annual reports, in practically every instance, include the rules and tariff of commissions governing the members of the body in question.

This tabulation also reached Congress and was in published form prior to the passage of the Anti-Trust Act of 1890,and so nearly prior thereto that, under the analogy of the rule governing the matter of notice in case of agency, (Distilled Spirits, 11 Wall., 356, 366), Congress must be taken to have been entirely familiar with this subject while it was legislating on the subject of commerce.

That the Act of July 2, 1890, was not intended to have the effect to transform such organizations from bodies recognized and treated as lawful into criminal conspiracies is plainly apparent from the subsequent reports made to Congress by the Interstate Commerce Commission.

In the Annual Report of 1890, the New Orleans Cotton Exchange and the Chicago Board of Trade are stated as having appeared as complainants, (pp. 88, 100.) The Commission changed its plan of reporting causes disposed of, after 1890, so that the Annual Report of 1895 discloses the complainants who appeared in the intervening period, as follows: Boston Chamber of Commerce, p. 133; Detroit Board of Trade, p. 146; New Orleans Cotton Exchange, three times, pp. 147, 161, 181; Milwaukee Chamber of Commerce, p. 149; Toledo Produce Exchange, twice, pp. 150, 189; New York Produce Exchange, p. 154; Chicago Board of Trade, p. 169; Philadelphia Commercial Exchange, p. 178; San Francisco Produce Exchange, p. 178; Boston Fruit and Produce Exchange, twice, pp. 180, 184; and Cincinnati Chamber of Commerce, p. 206.

In the 1896 Report the following are disclosed as having appeared before the Commission: Detroit Board of Trade (154); Chicago Board of Trade (177);

Memphis Chamber of Commerce (205); and Duluth Chamber of Commerce (205).

In a reported case, the right of such a body to appear as a complainant was drawn in question and affirmatively adjudged to have been conferred by Section 13 of the Interstate Commerce Act, the Commission saying:

"Such associations *exist in nearly all the principal commercial centers of the country.* It is *a matter of common knowledge* that they have for their object the bringing about of such results as will *improve the commerce of their respective localities.* The individual interests of the members, to a certain extent, are merged in that of all the other members, and this fact gives such associations *a standing* before the Commission which enables them to be heard upon the subject of alleged unreasonableness of rates or other conduct on the part of the carriers which is contrary to the provisions of the Act. Certainly such associations are *deeply interested* in all questions affecting the transportation of commodities."

Boston Fruit and Produce Exchange v. New York etc. R. Co., 4 Int. C. C. Rep., 661, 680, (VEAZEY, Com.);

Boston Chamber of Commerce v. Lake Shore R. Co., 1 Int. C. C. Rep., 436, 438;

New Orleans Cotton Exchange vs. Cincinnati etc. R. Co., 2 C. C. Rep., 375, 377, 382.

So that in 1887 Congress had recognized Exchanges as *lawful organizations* and entitled them to be heard before the then newly created Commission; and although the latter had characterized them as eminently interested in the *improvement* of commerce, and published its declaration to the world, there is no trace in the Congressional Record of any criticism upon or dissent from this conclusion; certainly no contention that in 1890 Congress had denounced these numerous bodies

to be thenceforth illegal and their members each guilty of a crime.

In September, 1894, the Interstate Commerce Commission issued a detailed list of the various commercial organizations in the United States, stated to have "been prepared for the use of Government and the public," and to be an official document. In this pamphlet the various Exchanges devoted to agricultural and commercial products, *including the defending Exchange*, and others of the same character, their location, and the names of their respective officers, are set out in detail. (See pp. 6-11; 13-15; 18-21; 23-25; 27; 28; 30-35.)

In the September, 1897, number of the magazine entitled "Municipal Affairs," under the heading "Business Men in Civic Service," (p. 491), an interesting account is given of the origin and constitution of the Merchant's Municipal Committee of Boston. It appears that in that law-abiding community, the Mayor, having noted that the various Exchanges had "taken a keen interest and have done very effective work in national and state affairs as well as in ordinary commercial enterprises," and appreciating that "the most pressing problems before the City of Boston relate to its *further development as an industrial center*, questions of foreign commerce, domestic trade and local manufactures," (p. 492), enlisted the active co-operation of these bodies in administering the government of the municipality. He asked six of the Exchanges to select an advisory committee of seven members, and his "invitation met with a hearty response from the business men of the city." (p. 493). The experiment has proved highly successful and the measure bids fair to become a permanent factor in municipal government; unless, of course, it should happen that the time and attention of the members of the Committee should be too much taken up in efforts to successfully defend a prosecution to enforce the penalties prescribed by the Act of Congress, or the various Boards of Trade, Exchanges and Clearing Houses

which selected them be adjudged to be unlawful combinations and as such be judicially dissolved.

III.

EXCHANGES DO NOT CONSTITUTE COMBINATIONS OR CONSPIRACIES IN RESTRAINT OF TRADE. ON THE CONTRARY, THEY PROMOTE AND FACILITATE IT.

These organizations have existed for so long a period and in so many cities, and their rules and dealings affect so much of the commerce of the world, that if trade is or ever has been *restrained* because of them, the proof thereof must be both patent and notorious. Indeed, it might be well said of them "*Vetustas pro lege semper habetur*"—Ancient custom is always held as law.

Packet Co. v. Catlettsburg, 105 U. S., 559, 563.

In the days of Elizabeth, when the promotion of commerce engrossed the attention of the English government and people, and which may be said to be the age when the commercial ascendancy of our mother country received its greatest impetus, Sir Thomas Gresham organized the Royal Exchange (1565–70). In 1571, the first purely mercantile Exchange was established at Cornhill, (Dos Passos, Stock Exchanges, 8), and this was the forerunner of the London Corn Exchange and of the many English Exchanges devoted to the trade in grain, wool and metals, and also served as the prototype for the Clearing House, and similar institutions, all of which, in the eyes of the law, "are *in the nature of business clubs.*"

Stutfield & Cantley, London Stock Exchange, 2 ed., p. 3;
Caldicott v. Griffiths, 8 Ex., 898, 903, 904;
Belton v. Hatch, 109 N. Y., 593, 596;
"Lloyd's," 45 Fortnightly Rev., 527-530.

Exchanges differ from the trade guilds of ancient

times in the respects which caused certain of the by-laws and regulations of those bodies to be contested in the courts, and which rendered them obnoxious in the eyes of a number of political economists. The striking fact that Exchanges, Clearing Houses, and kindred associations, were not only permitted to be formed but were encouraged by the active support of the government and earnest plaudits of the whole people, in days when contests against restraints on trade and monopolies were constantly before the courts and formed the subjects of many political and economical discussions, speaks louder than a wealth of authority in favor of their status under the law and in the light of public policy.

Associations to Regulate the Manner of Conducting Trade.

However, by scanning the cases which involved the validity of given rules of trade guilds, the specific and fundamental distinction between illegal combinations, and associations for *the good of trade*, is found to be conclusively established.

In 1668, nearly fifty years before Mitchel v. Reynolds definitely overturned the drastic rule which had been laid down in Dier's case in 1415, one of the trade guilds was assailed as being in restraint of trade and as tending to a monopoly. In upholding the lawfulness of the organization, the distinction was outlined as logically flowing from Player v. Jenkins, Sid., 284; 2 Keb., 27, (1665), that, instead, its rules constituted a a mere *regulation for the fair and orderly conduct of trade*, and were designed to provide conveniences to that most commendable end.

Freemantle v. Silk Throwsters Co., 1 Lev., 229.

In 1684, it was noted, in considering the validity of the charter of the East India Company, conferring the exclusive privilege of trading with the Indies,

against the objection that it was void as a monopoly, that "it is observed by many historians that the most flourishing trades have been begun by united stocks and policies"; and that "*a straggling trade* managed by particular persons, whilst everyone strives to defend his own private interests, *will ruin the trade* in general."

East India Co. v. Sandys, 10 How. St. Tr., at 540, 547.

In Wannel's Case, 1 Stra., 675; 8 Mod., 267, decided in 1725, (11 years after Mitchel v. Reynolds), the general question received elaborate consideration. There, the plaintiff had served as apprentice to a merchant tailor for the prescribed period. He demanded the freedom of the City of London, apparently for the purpose of setting up as a joiner. It was objected that an ordinance of that city (which, for all practical purposes, stood on the same basis as a guild rule, for it was not valid if unreasonable), prohibited any one from acting as a joiner therein without being free of (*i.e.*, belonging to or permitted by) the Joiner's Company. The provision was attacked as being *in restraint of trade* and defended as being *for the benefit of trade*. "And of that (the latter) opinion was the Court, it being properest for such a person to be under the regulation of that Company who understood the trade best." On a second argument, Lord Chief Justice RAYMOND, for the court, said: "We are all of opinion that this is a good by-law, being made in *regulation* of trade (and not in restraint thereof, 8 Mod., at 270), and to prevent fraud and unskilfullness, of which none but a company that exercise the trade can be (competent) judges."

In Rex v. Harrison, 3 Burr., 1322, the same question was raised as to the validity of a similar ordinance concerning the Company of Butchers. It was argued that "this by-law *restrains trade*. It narrows the privilege and is an injurious restraint to trade and traders, and a clog to their liberty. * * * And the increase of their profits is the only purpose of this

by-law." (1326.) In answer, it was argued by Mr. Eyre that there was *no restraint but a regulation of trade*, by the proper conduct of which the public was largely benefited. (1327.) The court was "clearly and unanimously" (so the report recites) of the opinion that the by-law was valid, Lord MANSFIELD saying: "*This is a regulation of a very extensive trade.*" DENISON, J., added: "*This is only regulating the trade to what is most right and reasonable.*" (1328). Wannel's Case was fully approved.

Subsequently, Lord MANSFIELD declared the distinction between a *restraint* of trade and a *regulation* of some branch thereof, to be "*a very clear case.*"

Pierce v. Bartrum, 1 Cowp., 269.

So, too, by virtue of a series of Parliamentary grants, the city of London was authorized to *regulate* the occupation of a broker and to forbid any one to act as such who had not been duly admitted. The scope of the regulations made is disclosed by the conditions of the bond required to be given (set out in full in *Ex parte* Dyster, 1 Meriv., 155 and Green v. Weaver, 1 Sim., 404, 412), among which are that such a broker was prohibited from "buying any goods, etc., to barter and sell again *upon his own account*, or for his own or any other broker's benefit or advantage;" he was obligated not to "make any gain or profit in buying and selling any goods over and above *the usual brokerage;*" and it was enjoined on such brokers that they "shall not employ any person to act under him to act as a broker not being duly admitted as aforesaid, and *shall not presume to meet and assemble in Exchange Alley, or other public passage or passages within this city and liberties thereof, other than upon the Royal Exchange.*"

In Cope v. Rowlands, 2 M. & W. 149, 151, 159, Mr. Baron PARKE declared that the policy thus evidenced "appears to have existed in the earliest times, and *for the convenience of trade and the public good*," and in Green v. Weaver, 1 Sim., 404, 422, these views

were reiterated and (at p. 433) a case involving the matter of properly regulating brokers was declared to be one of "vast importance to the commercial interests of the country."

Smith v. Lindo, 4 C. B., N. S., 395;
Scott v. Cousins, L. R., 4 C. P., 177.

A suit being brought to enforce the conditions of such a broker's bond, BEST, C. J., said: "I am satisfied that *no body of men will rejoice more in seeing the regulations enforced than the brokers themselves*," which has been quite as true on the part of all reputable brokers to the present day.

Proctor v. Brain, 3 C. & P., 536, 540.

In Robinson v. Kitchin, 21 Beav., 365, 371, it was ruled that by holding himself out as a broker, the defendant impliedly represented that he was subject to these regulations, "for *otherwise no person would employ him*."

REASONS FOR ESTABLISHING EXCHANGES.

In recognition of the absolute necessity that business shall be conducted under just and uniform usages, and that fair dealing and a high standard of business morality should be enforced, Exchanges have been formed and have at all times received the earnest support of Governments bent upon raising their nation or state to prominence in the commercial world. The Rialto and other points with which historians and other authors have made us familiar, illustrate the tendency to carry on a given trade at some fixed place. Out of this grew the organization of Exchanges, whereby a permanent place was provided, certain privileges brought into being, and the usefulness of the associates increased. As a result, trade was stimulated in general and attracted to a given market in particular. The public was benefited and the associates encouraged in their occupations.

Mr. Dos Passos, in his treatise on Stock Exchanges, which has been judicially characterized to be "a valuable contribution to the learning of the profession" (Eliot v. Merchants' Exchange, 14 Mo. App., 234, 243), declares in his admirable preface that the aggregate annual transactions of Stock Exchanges alone "reach figures which are simply *too vast for human comprehension to grasp*," and that such "Exchanges have become of *incontestable value to the public*." (III., IV.) He also declares that "it is absolutely certain that without the existence of great public marts like the New York and London Stock Exchanges *the marvelous development and progress of this country, which make it the admiration and wonder of the civilized world, would not have been attained*." (Preface, IV.)

"The business of buying and selling stocks, although of modern origin, has grown to be one of gigantic magnitude, employing yearly more capital, perhaps, than any other commercial pursuit."

Dos Passos, 343.

In Biddle on Stock Brokers (p. 40) it is said that "the associations have proved of such *commercial value*, and the Stock Exchange is so convenient and *useful* an institution, it has become almost the *sole medium* for the purchase and sale of stocks, etc."

In their treatise on the law of Produce Exchanges Messrs. Bisbee and Simonds say that "it will scarcely be denied that as an institution the Board of Trade has attained a position not inferior in influence and importance to any of the distinctive adjuncts of this commercial age. In fact, *it is now a factor in our material development as indispensable to its present entirety and future progress, as is either the railroad or the telegraph.* In its present form, indeed, the Produce Exchange is *a legitimate outcome of modern commerce, the necessity for which could be fully realized only in its absence*." (Preface, VI.)

The Paris Bourse can trace its history at least to

1304. (Dos Passos, 324.) The London Stock Exchange was formally organized in 1798 (Dos Passos, 261), and the New York Stock Exchange was established in 1792 and organized into an active body in 1817. (Dos Passos, 9.) It is noteworthy that the London and New York Stock Exchanges were both created by *voluntary contracts* and have continuously existed as *unincorporated associations.*

It is observed, referring to an author who wrote in 1622, that "the advantage of employing brokers as intermediaries in the purchase and sale of property seems to have been early recognized among the merchants," (Dos Passos, 6), and it has been judicially noticed by an authority of the greatest possible weight in this branch of the law, that by employing a broker "*inconvenience and hampering of trade*" were avoided, and that by not making such employment "there would be great risk of *missing the most profitable way of making the transaction*, which a broker would not" (Speight v. Gaunt, L. R., 9 App. Cas., 1, 20, 22).

And so it has been noted that it is a feature of nearly every Exchange that its members constitute the local market in particular commodities.

"Its transactions embrace nearly all business in certain lines, especially breadstuffs and provisions."

Eliot v. Merchants' Exchange, 14 Mo. App. 234, 237.

At the present day, especially "in the United States, business done through them is *generally restricted* to such brokers as are members of an Exchange."

Dos Passos, Stock Exchanges, 101, 102.

"It has become almost the *sole medium* for the purchase and sale of stocks, etc."

Biddle, Stock Brokers, p. 40.

The fact that "transactions therein *were confined to members*" was declared to be so well-known that a party invoking the services of a firm of brokers "must

be assumed to have employed them because they were such members, and he was not."

Kent v. Woodhull, 23 Jones & S., 311, 315.

In Nicholson v. Gooch, 5 E. & B., 999, 1000, the rules of the London Stock Exchange "are printed, and a copy formed a part of the case," and it was said that "the effect of those rules, so far as material to the present case, was, that *all dealings on the Stock Exchange must be between members*," and in *Ex parte* Grant, 13 Ch. Div., 667, the rules being again set out (668–670), it was noted that by ceasing to be a member a person was no longer "capable of *dealing on or entering* the Stock Exchange" (670). To the same effect, White v. Brownell, 2 Daly, at 342. And this Court noted, in Hansen v. Boyd, 161 U. S., 397, 408, that the transactions there in question "were to be made on the Chicago Board of Trade *with the members thereof*."

The same situation was likewise noticed in Brass v. Worth, 40 Barb., 648, 654, and Child v. Hugg, 41 Cali., 519, 521.

And though "all persons are *sedulously excluded* who are not members, * * yet strangers can always be represented by brokers (members) of their own choosing, who will carry out the wishes of their principals" (Dos Passos, 209), or, if necessary, sub-employ some broker who can do so (Maryland Ins. Co. v. Dalrymple, 25 Md., 240, 260).

RULES CONSTITUTE A CODIFICATION OF TRADE USAGES.

In an important case, Lord HATHERLY, speaking in the House of Lords concerning the rules of an Exchange, with that accuracy and perspicacity which make his utterances so valuable a contribution to the law, defined these rules to be A CODIFICATION OF "THE USAGES AND CUSTOMS WHICH HAVE BEEN ESTABLISHED BY THE PARTIES IN THAT MARKET, AS AMONG THEM-

SELVES FOR THE BETTER CONDUCT OF THEIR BUSINESS."

Nickalls v. Merry, L. R., 7 H. L., 530, 546, 547.

Judge FOLGER embodied the same thought in describing an Exchange to be a market "where *the power to deal* is a privilege obtained by payment of a fee and is restricted to a body which has, for its regulation and government, come under certain prescribed rules or *established usages.*"

Walls v. Bailey, 49 N. Y., 464, 473.

Lord Justice JAMES having indulged in a somewhat figurative allusion to the powers claimed by an Exchange, (4 Ch. Div., 555, 561), which that body "considered to contain an aspersion upon the whole body and its customs," (Melsheimer, Stock Exchange, 98), an appeal was taken to the House of Lords, not because there was any hope of reversing the judgment, but to the end that an authoritative characterization of Exchanges and their rules might be had. In the appellate court, Lord Chancellor CAIRNS, after collating the leading rules of the organization, said: "I can see *nothing whatever in the rules which is deserving of any animadversion whatever. They seem to me to be judicious and business-like rules.*"

Tompkins v. Saffery, L. R., 3 App. Cas., 213, 220, 227, 228.

Lord O'HAGAN said in the same case, p. 228:

"I feel bound to say that I see nothing in the case which impeaches the integrity, in purpose or in action, of the Stock Exchange. * * I think *there is no ground whatever for * * an imputation of impropriety either as to the rules of the body or the proceedings of its members.*"

Lord BLACKBURN said, on page 232, that by becoming a member of the Stock Exchange the party did not enter into "an agreement enforcible in law, but an *honorary agreement* that he would act in his dealings upon the Stock Exchange *according to its rules*, as long

as he continued to be a member." See also 237, 238.

Lord GORDON said, on page 238: "It is a *great matter* that there should be a code drawn up, not of course binding upon the public, but for the purpose of regulating their rights *inter se*, and with a view to promote equality in cases of difference amongst themselves."

As this case was decided by Lord Justice JAMES in December, 1876, and by the House of Lords in 1877, it is evident that the movement which culminated in the appointment of a Royal Commission, in the latter year, to examine into the history, operations, and rules of the London Stock Exchange, not only influenced the appeal, but had the effect of bringing the importance of the questions involved and the necessity of expressing conclusions with unusual care and precision, prominently before the House of Lords.

The Royal Commission included Lords PENZANCE and BLACKBURN, both known as eminent judges and as statesmen of large experience. Lord BLACKBURN was exceptionally well qualified to intelligently discharge the duty thus imposed upon him. He was, as has been noted, a member of the House of Lords when Tompkins v. Saffery, L. R., 3 App. Cas., 213, 232, was considered, and had previously discussed the same general question in a most exhaustive manner, (Maxted v. Paine, L. R., 6 Ex., 132, 147–181), and delivered an interesting opinion in Duncan v. Hill, L. R., 8 Ex., 242.

After hearing many witnesses and considering the matter *for more than fourteen months*, the Commission, in July, 1878, made an elaborate report to Parliament.

The conclusions of the Commission, printed in Dos Passos on Stock Exchanges (Preface, V., and see also text, 260, 261), were as follows:

"The main object of the association appears to be the *easy and expeditious transaction of business and the enforcement among themselves of fair dealing*.

"Our opinion is that, in the main, the existence

of such an association, and the coercive action of the rules which it enforces upon the transaction of business, and upon the conduct of its members, have been *salutary to the interest of the public.*

"We recognize *a great public advantage* in the fact that those who buy or sell for the public in a market of such enormous magnitude in point of value, should be bound in their dealings by rules for the enforcement of fair dealing and the repression of fraud, capable of affording relief and exercising restraint far more prompt, and often more satisfactory, than any within the reach of the courts of law."

The Commission closed its report as follows:

"It is recommended by us, not because we have any reason to think that the present association has at all, in the main, fallen short of its duties in the past, but rather *for the purpose of strengthening its hands and increasing its efficiency in the future*, that the London Stock Exchange be incorporated either by Royal Charter or an Act of Parliament; and if, PRESERVING THE ELEMENT OF SELF-GOVERNMENT, *additional weight could be given to the institution*, and additional consideration and reliance be bestowed upon its members, by investing the existing association with a public character in the form of a charter of incorporation, we are of opinion that it would be *a sensible gain to the public.*"

This was a public document and had been known for *twelve years before Congress passed the Anti-Trust Act of 1890.* The report had been published by Dos Passos in 1882. It expressed the conclusions of eminent statesmen and has been acquiesced in by Parliament and the commercial world.

It may, therefore, be fairly said that no person was ever better qualified than Lord BLACKBURN to express an opinion upon the status and merits of Exchanges, and in respect of the effect of such bodies, their rules and operations, upon trade and the interests of public;

and his deliberate conclusions, judicially recorded in 1884, six years after this Report had been made, are consequently entitled to the very greatest possible weight.

An action was brought to charge a trustee under a will with the loss of a very large amount (£15,275) resulting from the dishonesty of a broker whom he had employed to invest that sum on behalf of the trust estate. The broker was located at Bradford, where there was no Exchange, and having reported that he had purchased the desired securities on the London Stock Exchange and rendered an account to that effect, the trustee, without any further inquiry, paid him the amount, although the securities were not produced. In fact, no such securities had been bought, and the broker absconded with the funds. The result was an exhaustive examination into the question whether he was chargeable with negligence.

In expressing his opinion that the trustee was not liable, Lord BLACKBURN made these interesting statements:

"The brokers in London first established a voluntary society who met in the Stock Exchange, so that London brokers who had been instructed to buy or sell might meet and make their bargains. Then, *with a view to economize business, on the same principles as those which led the bankers to establish a clearing house*, the rules of the London Stock Exchange were established, which from time to time have been improved and altered. * * *This system has been found to work in practice so satisfactorily* that not only are enormous sums paid on the account day in London, but the brokers in those large towns, where the business is sufficient to make them what a witness calls 'Stock Exchange centers,' have established Stock Exchanges of their own with rules not identical with those of the London Stock Exchange, but founded on the same principles."

Speight v. Gaunt, L. R., 9 App. Cas., 1, 21.

The nature of this litigation was such, the amount involved so large, the learning of the eminent counsel who appeared for the plaintiffs, (among whom were included gentlemen now well-known as Lord Justice RIGBY, Mr. Justice STIRLING, and Sir FRANK LOCKWOOD), so profound, and the necessity to challenge the propriety of a resort to the Stock Exchange and a reliance, by the defendant, upon its rules, so pressing, that their acquiescence in the lawfulness of the machinery invoked by the trustee, is a most persuasive consideration. Lord BLACKBURN'S conclusions were in affirmance of the judgment of the Court of Appeal and in concurrence with his associate Lords.

In the Court of Appeal, Sir GEORGE JESSEL, M. R., proceeded in acceptance of the opinion expressed by Lord Chancellor HARDWICKE (in *Ex parte* Belchier, Amb., 218) that where a trustee acts "conformably to the common usage of mankind," he is not liable, and that to show a want of confidence in the integrity of broker employed accordingly, "would tend *greatly to the hindrance of business.*" The Master of the Rolls proceeded that, in accordance with "the ordinary course of business transactions * * * a man who buys stock on the Stock Exchange employs a stockbroker, and *there it is absolutely necessary for him to do so: he cannot buy himself.* * * * I cannot understand why it should not be a lawful custom to give the money to your broker to pay for the stock, which you cannot get without the money. * * * *There is nothing unlawful or unreasonable in it. You cannot get the stock on the Stock Exchange without dealing with a broker.*" (742, 745, 754). Similar statements were made by his associates (LINDLEY, L. J., at 762, and BOWEN, L. J., at 763). Lord Justice LINDLEY took judicial notice of "the way business is done through brokers in buying ordinary stock" (759), for which a precedent which had been set by Lord KENYON

as far back as 1800. (Child v. Morley, 8 T. R., 610, 614).

Speight v. Gaunt, 22 Ch. Div., 727.

In the House of Lords, the Earl of SELBORNE, L. C., adopted these views, and justified the act of the trustee in paying over the money to the broker by a reference to the rule of the Exchange that no one but a member would be recognized in dealings had under the auspices of that body. He also said that its rules were so well-known that judicial notice might fairly be taken of them.

Speight v. Gaunt, L. R., 9 App. Cas., 1, 10, 12.

This case is recognized as declaring the true rule as to the liability of trustees under such circumstances.

1 Perry, Trusts, Sec. 404;

Horton v. Morgan, 19 N. Y., 170, 172.

It has recently been declared, speaking of the Boston Stock Exchange, that its rules "are *appropriate means* for the quick and economic transaction of large volumes of business."

Dillaway v. Alden, 88 Me., 230, 236.

The accuracy of Lord BLACKBURN'S conception that the rules of such a body constitute "an honorary agreement" among its members is strongly confirmed in the very interesting treatise on "The Law and Customs of the Stock Exchange," by Melsheimer and Gardner, 3rd ed., London, 1891:

"The inviolability of bargains is the foundation stone of the whole Exchange system. * * The very notion of attempting to render any bargain void on account of a quibble or technical omission is altogether repugnant to the feeling of the Stock Exchange, and is regarded as dishonorable and discreditable in the highest degree. * * *The members have bound themselves together by a code of honor* based on the inviolability of bargains, and the maintenance of this standard has always been regarded as the *principal function* of

the Committee, (98). * * No statute of limitations is recognized on the Stock Exchange," (102).

Legal Status of Trade Usages.

The theory that the rules of such a body constitute *a codification af trade usages* has been recognized in many cases. The value of such usages is generally conceded to be exceedingly great, and their tendency to increase the facilities for the proper conduct of trade and the promotion of fair dealing, has been judicially declared. Indeed, Lord Chief Justice Cockburn has shown that the law merchant "is neither more nor less than *the usages of merchants in the different departments of trade*, ratified by the decisions of courts of law, which, upon such usages having been proved before them, have adopted them as settled law, *with a view to the interests of trade and the public convenience.*"

Goodwin v. Robarts, L. R. 10 Ex., 337, 346.

In some of the cases a disposition has been manifested to limit the value and effect of usages, generally speaking. The reasons given,—the principal one being that thereby a meaning might be ascribed to given language different from its construction under common law rules,—have little, if any, force (especially at the present day), when the subject under consideration consists of *mercantile or trade usages*. There is a universal acceptance of the proposition that when such usages are uniform, reasonable, and generally known, they are of the utmost utility and of the greatest possible benefit to trade in general.

In view of the great volume of business done by means of the machinery and facilities provided by Exchanges, a series of mercantile usages adopted by such bodies necessarily become invested with the important elements of *uniformity*, and of *notoriety*, especially when embodied in the published rules of such a body and acted under day by day, in countless instances. It

is a necessary consequence that such a usage will, in the course of time, attract to itself the characteristic of being judicially noticed.

Rennert v. Bank of Columbia, 9 Wheat., 581, 585, 588;
Consequa v. Willings, 1 Pet. C. C., 225, 230;
Brandao v. Barnett, 12 Cl. & F., 787, 805;
In re Catford, 15 Reports, 3, 5.

A learned court, after emphasizing that such usages were for the convenience of trade and the public benefit, said that "this process of law-making is perhaps the most unexceptionable," and that when commercial interests were involved, a code of approved trade usages was preferable to the necessarily unbending declarations of legislative enactments.

Connor v. Robinson, 2 Hill, So. Car., 354, 358;
Also, Barlow v. Lambert, 24 Ala., 704.

However, it is by considering whether the *propriety and reasonableness* of the usages thereby codified, *i. e.*, whether all concerned have shown their concurrence in their fairness by permitting the provision to attain the force of an established uniform usage, (Goddard v. Merchants' Exchange, 9 Mo. App., 290, 296), and whether experience has demonstrated that a given code of rules is of *public convenience* and to *the advantage of trade*, that some phases of the status of Exchanges can be fairly judged in analogy to the rules laid down in reference to recognized mercantile usages.

A very high authority has declared that "*the universality of a usage* voluntarily adopted between buyers and sellers *is conclusive proof of its being in accordance with public convenience.*"

Goodwin v. Robarts L. R., 10 Ex., 337, 353.

The American courts have said:

"There are *none more interested* than those immediately concerned in the particular trade to establish those usages that are *reasonable in themselves* and *precisely suited to the occasion.*"

Connor v. Robinson, 2 Hill, (So. Car.), 354, 358;
Baxter v. Rodman, 3 Pick., 435, 440;
Leach v. Beardslee, 22 Conn., 404, 409.

Such usages "are generally found in practice to exhibit a *superior adaptedness to the convenience and wants of the community* to those which are superseded by them and in this way *development* and *progress* result. * * *It is not likely in modern times that anything unreasonable would be suffered to grow into a usage.*"

McMasters v. Pennsylvania R. Co., 69 Pa. St., 374, 378;
Kershaw v. Wright, 115 Mass., 361, 365.

"In great centers of trade where the volume of business is immense, usages which facilitate the completion of transactions and the final settlement of accounts between the parties interested, are natural and indeed *necessary*."

Everingham v. Lord, 19 Ill. App., 565, 570.

RULES FOR THE ORDERLY CONDUCT OF BUSINESS AND REGULATING COMPENSATION FOR SERVICES RENDERED.

Following the principle laid down in Player v. Jenkins, Sid., 284, and in Player v. Vere, T. Raym., 288, 324, it has been repeatedly recognized that regulations designed to free commerce from inconvenience and to secure *its orderly conduct*, instead of being an injury, are a commendable advantage to the public interests.

Perkins v. Lyman, 9 Mass., 522, 530;
Leslie v. Lorillard, 110 N. Y., 519, 534;
Case of Boot & Shoe Makers, Carson's Edition of Wright on Criminal Conspiracies, p. 146.

In Grissell v. Bristowe, L. R., 4 C. P., 36, 48, Lord Chief Justice COCKBURN, speaking of an Exchange rule, declared that "*a usage founded on the general con-*

venience of all persons engaged in a particular department of business can never be said to be unreasonable," or, to state it in another way, a rule or practice concurred in by all who are engaged in a given trade and interested in its promotion must necessarily secure its proper conduct and protect it from injurious happenings. Mayor v. Hall-day, L. R., 1898, 1 Q. B., 125. 130.

This construction of the proposition is supported by Mr. Chief Baron KELLY's emphatic declaration, in the same case, that in the absence of an exchange, and brokers constituting it, there would be "a state of things which, in this country, where some hundreds of these purchases and sales are effected every day, would be found *intolerable*, and *would speedily demand a remedy than which no better could be devised than this practice so long established.*"

Grissell v. Bristowe, L. R., 4 C. P., 36, 53.

He substantially repeated these expressions in a case which disclosed that in order to act as a broker to conduct transactions on 'Change it was necessary to be a member of the organization.

Duncan v. Hill, L. R., 6 Ex., 255, 259, 266, 267.

In Maxted v. Paine, L. R., 4 Ex., 203, 218, BRAMWELL, B., declared of the Chief Baron's conclusions, that "*nothing can be better said.*"

Such rules also have the highly commendable effect of inculcating and enforcing an adherence to a high standard of commercial honor. As phrased by LUSH, J., referring to one of the rules of an Exchange, "it is as much the interest of that body, as it is *the interest of the public* who buy and sell through their agency *to promote fair dealing.*"

Maxted v. Paine, L. R., 6 Ex., 132, 142.

In the same case, BLACKBURN, J. outlined that "the committee of the Stock Exchange exercise a power over the members very analogous to that which the courts of law summarily exercise over the attorneys who are officers of their courts."

Maxted v. Paine, L. R., 6 Ex., 132, 177.

The typical Exchange "undertakes to exercise a salutary control over its members, * * and scalpers' (persons undertaking to deal otherwise than in conformity to its rules) cannot live in that atmosphere, they bearing the same relation to that fraternity of *commercial gentlemen* that *shysters* do to full-bred lawyers."

Clark v. Foss, 7 Biss., 547, 555, (affirmed on appeal, not reported, but stated in Ward v. Vosburgh, 31 Fed. Rep., 12, 15).

The general proposition has been long since and most firmly established that the rules and regulations of an Exchange define the powers of members thereof when employed as brokers or other agents, and become parts of all contracts made with reference thereto. (Bibb v. Allen, 149 U. S., 481, 489, 491, 501). This is true, in most instances, even though the party sought to be affected had no actual knowledge of the existence or terms of the rule in question.

Sutton v. Tatham, 10 A. & E., 27;
Mitchell v. Newhall, 15 M. &. W., 308;
Stray v. Russell, 1 E. & E., 888, 900;
Nickalls v. Merry, L. R., 7 H. L., 530;
Cruise v. Paine, L. R., 6 Eq., 641, 650; 4 Ch. App., 441;
London Founders' Asso. v. Palmer, 20 Q. B. D., 576, 580;
Peabody v. Speyers, 56 N. Y., 230, 233;
Bailey v. Bensley, 87 Ill., 556, 559;
Perine v. Parker, 25 Ill. App., 465, 469, 470; affirmed, 126 Ill., 201, 211, 212;
Kraft v. Faucher, 44 Md., 204, 215, 216;
Melsheimer, Stock Exchange, 33;
Dos Passos, Stock Exchanges, 356-362.

In respect of the element of the agent's compensation, the rule is that one who employs a member of

an Exchange thereby agrees to pay the commission or brokerage fixed by the rules.

If a given schedule has been universally recognized, by all interests, for a long period (here, then years), and after having been practically applied to many transactions (here, countless thousands involving, annually, property worth millions of dollars), it is not only conclusively reasonable, but if the volume of business has increased and the industry affected has developed or progressed under the operation of such schedule, it is *in palpable denial of irrefragable facts and of established truth* to say that trade has been restrained or injured by the schedule in question.

Such a rule establishes *uniformity;* its wide circulation brings its terms to the *knowledge* of every one dealing at that market, or the commodity there dealt in; and its operation in actual practice furnishes the best test for determining whether the rates thus prescribed are *fair* and the rule itself *promotive of trade.*

In the present instance, the rates fixed are so firmly entrenched and so conclusively reasonable that if a question of compensation for similar services should arise between parties, *neither of whom belonged to the Exchange*, the usual or reasonable compensation to be paid in that case would doubtless be determined with reference to the rates fixed by the rules of that body.

Thomas v. Brandt, 26 Atl. Rep., 524, (Md.);
Sewell v. Corp, 1 C. & P., 392;
Kock v. Emmerling, 22 How., 69, 74;
Stewart v. Cauty, 8 M. & W., 160;
Bayliffe v. Butterworth, 1 Ex., 425;
Morgan v. Mason, 4 E. D. Smith, 636, 638;
Miller v. Insurance Co., 1 Abb. N. C., 470, 476.

This is clearly so if the rates thus fixed are of such general notoriety as to warrant the inference of knowledge thereof on the part of the employer.

Laver v. Hotaling, 46 Pac. Rep., 1070, (Cali., 1896);

Hansbrough v. Neal, 27 S. E. Rep., 593, (Va. 1897).

It is to be observed that nearly every case between broker and client to be found in the books involved, among others, a claim for the *prevailing commission*, and that while occasionally question has been made whether the broker was entitled to be compensated at all, in not a single instance was it even hinted that the rates fixed by the rules did not correctly measure the amount to be paid or the *reasonable value* of the work done by a member of an Exchange. For illustrations, see, among others:

Roundtree v. Smith, 108 U. S., 269;
Irwin v. Williar, 110 U. S., 499;
Bibb v. Allen, 149 U. S., 481;
Hansen v. Boyd, 161 U. S., 397;
Gilbert v. Gaugar, 8 Biss., 214;
Bangs v. Hornwick, 30 Fed. Rep., 97;
Ward v. Vosburgh, 31 Fed. Rep., 12, 18;
Rorke v. Stock Exchange, 99 Cali., 196, 199, 201.

So, too, in considering the dealings on Live Stock Exchanges, "the commissions on the sale" came under notice.

Cordell v. Hall, 34 Fed. Rep., 866; 142 U. S., 116, 117;
Union Stock Yards Bank, v. Gillespie, 41 Fed. Rep., 231; 137 U. S., 411.

And among the benefits of an "enterprising" and "effective Exchange" is "the establishment of *regular warehouse charges*."

Hitch v. Hawley, 132 N. Y., 212, 214, 220.

Accordingly, payments of the usual commissions, being those fixed by the schedule of an Exchange, have been allowed to executors on settlement of their accounts.

Jones v. Powell, 6 Beav., 488;
Davenport v. Powell, 14 Sim., 275.

A Series of Inquiries.

If usages tend to the convenience of the public and are to the benefit of the trade, how can a codification of them be held to be illegal? It certainly greatly benefits trade that usages shall be made certain and that all controversy on the score of their uniformity shall be obviated. (Burbridge v. Gumble, 72 Miss., 371, 379). If a court will adopt an Exchange rule as evidence that a usage codified therein is so notorious that judicial notice may be taken of it, and declare that the universality of a usage so shown is proof conclusive of its fairness and its freedom from objection based on considerations of public policy, upon what principle can it be said that the Exchange or its code of rules operates in restraint of trade or marks the presence of a monopoly? Has it not become a usage, and even a *custom*, to establish an Exchange for the promotion of trade and the development of a market?

Why, may we ask, has London continued to be the great financial center of the world in spite of the herculean efforts of its Stock Exchange to *restrain the trade of that City?* Is it true that the New York Stock Exchange has become "*the heart of the business life*" of that City (Century Magazine February, 1897, p. 503), and that this is due to its "*long and honorable career* and the *high character of its members*" (3 N. Y. Supp., at 635), and that, nevertheless, its purpose, or the necessary tendency of the contract between its members, has been *to restrain trade?*

How has it been possible for Chicago to become the largest grain and live-stock market in the world, in spite of the existence of powerful conspiracies, in the form of two great Exchanges, to *restrain* trade in those commodities?

Must it not be said, either that such Exchanges *promote* trade, or that they are powerless to, and, there-

fore, do not, restrain, it? (Olmstead v. Distilling & Cattle Feeding Co., 77 Fed. Rep., at 269, 270).

The answer is to be found in the important fact that *the very first step* taken by any city aspiring to share in a given trade has been the organization of an Exchange. It is incomprehensible that while one body of men were seeking to *stifle* trade, their competitors elsewhere should believe it possible to *attract* trade to themselves by means of a similar *deterring combination.* And even more so, that this should have been not only permitted by the public but actually *encouraged in every possible way.* Thus, for what reason have Philadelphia, Boston, San Francisco, and Chicago permitted Stock Exchanges to become established and to flourish in their midst?

Is it not true, in direct contradiction of the theory of this action, that in every instance in which a given city has become a trade-center in some article of commerce, the growth and development of that branch of business has been and is still due *directly to an Exchange*? And is it not likewise true that every city aspiring to share in a given trade has employed the instrumentality of an Exchange? When a Grain Exchange was established at Chicago, was the example not followed by every city in the Union known as a grain market: New York, Philadelphia, Baltimore, St. Louis, Kansas City, Milwaukee, Minneapolis, Buffalo, Detroit, and Toledo? The same is true in the cotton trade, for the Exchange at New Orleans was speedily followed by similar organizations at New York, Charleston, Savannah, Mobile, Memphis, Galveston, Houston, and other points. The business of selling live-stock was no exception to the rule; the establishment of an Exchange at Chicago was followed by Exchanges of the same character at Kansas City, St. Louis, Omaha, Indianapolis, Buffalo, Sioux City, and other points. *Is there a single city in the civilized world which ranks as a leading market for a given commodity in which*

there is not an Exchange? And is there one which does not owe its standing and importance principally, if not entirely, to the existence of an Exchange?

It is no answer to say that the Exchanges differ in their characteristics and rules. Instead of such being the fact, it has been repeatedly noticed, by courts and authors, that *they are all framed on the same model* (99 Cali., 399). Indeed, in the most essential respects their rules are literally or substantially the same. Exchanges devoted to a given business present the features adopted to that business with a striking degree of identity to each other. An amendment, or the adoption of a new feature, at one point, has been speedily followed by similar action at all competitive markets. In all of them are to be found the features which this bill denounces as illegal, so far as the same have application to the business to which they respectively relate.

All Live Stock Exchanges have precisely the same rules and regulations. If this Exchange is an unlawful conspiracy, every other Exchange must likewise be condemned.

And yet it has been said, apparently as a matter of universal acceptance, and certainly without having provoked the slightest dissent or criticism, that "in its present form, the Exchange is *a legitimate outcome of modern commerce, the necessity for which could be fully realized only in its* ABSENCE."

Bisbee and S., Produce Exchanges, Preface, VI.

CONTRACTS TO FACILITATE TRADE.

The distinction between contracts or combinations to *restrain* trade, and those entered into for the purpose of *facilitating* trade and whose effect is its *promotion*, is not only recognized by the many cases decided by this in construing the Federal Constitution, including Cannon v. New Orleans, 20Wall., 577, Packet

Co. v. Keokuk, 95 U. S., 80; Sands v. Manistee River Improvement Co., 123 U. S., 288, and others of a similar nature cited, *supra*, but it is also established as fundamental and of decisive importance.

Thus, in a leading English case, a contract had been made between the owner of certain docks and a railway company, by which it was agreed that the railway company should have the right to use certain property belonging to the dock owner, and in consideration thereof bound itself for the period of 250 years that *all property coming to that port by means of its railway or any part or branch thereof should be unshipped at said dock*, and that if the railway company unloaded any of the freight secured by it *at any other dock*, it would pay to the owner of the dock the *same wharfage dues* provided to be paid for goods actually unloaded there.

Subsequently, the railway company made an arrangement by which it became the lessee for 999 years of a neighboring dock. Being sued under the former agreement, the validity of it was challenged, among other grounds, because it was *in restraint of trade.* The question was argued by counsel of the highest eminence and ultimately decided by the House of Lords.

LORD CHELMSFORD said, "*How it can be considered to be in restraint of trade, I cannot conceive.* It is NOT A PROHIBITION BUT A PERMISSION TO CARRY ON TRADE." (176.)

Taff Vale Ry. Co. v. MacNabb, L. R., 6 H. L., (Eng. & Ir. App. Cas.), 169.

"The contract certainly puts no restraint upon the freedom of the commodity to which it relates. It imposes no obligation upon nor offers any inducement to any person to produce less than the full extent of his capacity. On the contrary, its apparent purpose is, by making prices more uniform and regular, *to stimulate*

*and increase production. * * The contract intends that the parties shall make sales.*"

Central Shade Roller Co. v. Cushman, 143 Mass., 353, 363.

In an elaborately considered case involving the right of the Kansas City Commercial Exchange to regulate the inspection of grain at point—declared to have "become one of the great grain markets in the world"—, it was said that "for many years associations of merchants have appointed and employed experts to inspect grain. It was done to FACILITATE TRADE." And the court held that the right to limit dealings to grain thus inspected, the business being private, could not *constitutionally* be interfered with.

State *ex rel.* Attorney-General v. Smith, 114 Mo., 180, 191, 194, 199.

There is no matter upon which the public mind has been so quick to make complaint, and to originate legislation, as in denunciation of monopolies. Hence, the consensus of conclusion that such Exchanges, with their "long and honorable careers," have contributed more to the development and promotion of industrial enterprises than all other agencies combined, is proof conclusive that they are neither odious nor fraught with a tendency to injure the public welfare.

"If the (contrary) doctrine be sound, then a multitude of contracts convering many and diverse subjects, and which are being entered into every day of the world, and recognized and acted upon by both parties and courts, must fall to the ground."

Stephens v. Southern Pac. R. Co., 109 Cali., 86, 94.

THE STATUS OF COMPETING NON-MEMBERS.

It is charged by this bill in general terms that the members of the defending Exchange, are desirous that some one of them shall be employed to make sale of

every consignment to the Stock Yards at which they do business, and that consignors shall be "compelled" to pay to such member the commissions fixed by the rules. Stripped of all denunciatory verbiage, this allegation may, with the same force, be applied to every association of persons in trade or having an occupation or profession. The ambition is, indeed, highly commendable. Its success cannot, consistently, be branded as unlawful and criminal. The end being lawful, and no means being invoked which are contrary to law, it is impossible to work out an actionable wrong. "*The normal operation of competition in trade is the keeping away or getting away patronage from rivals by inducements offered to the trading public. The normal operation of the right to labor is the securing of better terms by refusing to contract for labor except on such terms.*" (TAFT, J., 62 Fed.Rep.,at 820.) "The effort of all competition is to drive out other competitors." (70 Fed. Rep., at 388.) No competition, *however successful*, is unlawful which is neither fraudulent nor forcible. (1892, App. Cas., at 47, 51.) So long as the public is served faithfully and adequately, and at reasonable prices, its interests are to foster and promote such associations. (64 Fed. Rep., at 950.)

Thus, where a principal instructed his broker not to conform to the rules of an Exchange to which the latter belonged in reference to a given transaction, and agreed to indemnify him for all losses he might sustain in the premises, the Court noted that "as a condition of admission to that Board and into the rooms occupied by it, the plaintiff (broker) agreed to be bound by certain rules. *Unless the plaintiff had such admission he could only carry on his business by employing other brokers who had such admission and to great disadvantage to himself*," and held that the agreement referred to was valid and supported by *a lawful and adequate consideration.*

White v. Baxter, 9 Jones & S., 359, 360, 368; affirmed, 71 N. Y., 254;

Harker v. Edwards, 57 L. J., Q. B., 147;
Smith v. Reynolds, 66 L. T. Rep., N. S., 808 810.

In Sewell v. Ives, reported in Dos Passos, Stock Exchanges, note, pp. 47, 48, the fact that the enjoyment of his membership was "*absolutely essential* to the discharge of plaintiff's business as a broker" was adjudged to add nothing to his legal rights.

Indeed, it is the distinguishing characteristic of an Exchange that "the power to deal" in its rooms or under its auspices and rules (even though the nature of the business is such that it cannot be transacted in a closed room, *ex gr.*, selling live-stock in the open air), is restricted to the members of the association.

Walls v. Bailey, 49 N. Y., 464, 473.

Such a provision is not only reasonable but absolutely essential to the existence and proper maintenance of an Exchange.

McQuillen v. Real Estate Exchange, 39 N. Y. St. Rep., 426; 15 N. Y. Supp., 206.

In pursuance of "the policy of the law, for the advantage of the public, to encourage and protect commercial enterprise," contracts not to divulge trade secrets (and, in principle, an agreement not to extend the benefits of the advantages of a commercial club to competing non-members, stands on precisely the same basis), are universally upheld. "If a man establishes a business (or if a number of associates do so), and makes it valuable by his skill and attention, *the good-will of that business is recognized by the law as property.*"

Peabody v. Norfolk, 98 Mass., 452, 457;
Salomon v. Hertz, 40 N. J. Eq., 400, 402;
Thum v. Tloczynski, 72 N. W. Rep., 140, 144, (Mich., 1897);
Washburn v. National Wall Paper Co., 81 Fed. Rep., 17.

The contention that a party must conduct his business under the motto that "competition is the life of

trade," coupled with the restriction that the moment his competition becomes irksome or injurious to a competitor, he is subject to the criminal law, is *felo de se.*

It has been so indicated, with admirable precision:

"It is difficult to see how, in the case of conflict of interests, it is possible to separate the two objects of benefiting yourself and injuring your antagonist. * * *Gain on one side implies loss to the other;* and *to say that it is lawful to combine to protect your own interests, but unlawful to combine (where the result is) to injure your antagonist, is taking away with one hand a right given with the other.*"

3 Steph. Hist. Crim. Law, 218, 219.

The Advantages of Exchanges.

By means of such organizations, inspired and managed by those who, of all others, are most deeply concerned in furthering the commercial interests affected thereby, manifest advantages result to the public:

Trade is promoted; better facilities provided; fixed and reasonable rates established; the odious and harmful system of rebates and discrimination, formerly prevailing, as outlined in the complainants' rebuttal affidavits, exterminated; unfair methods prohibited; honest dealing inculcated; a "great and growing market" built up; the taxable wealth increased; employment given to many people; and every lawful industry affected thereby is benefited to a greater degree than by any other "distinctive adjunct of this commercial age."

It has been ruled that the Attorney General will not be permitted to destroy such an instrumentality, even though it may invade what is a strict public right.

People v. Horton, 64 N. Y., 610, 617, 618;
Raritan Township v. Port Reading R. Co., 49 N. J. Eq., 11, 16.

Unless it be true that such an Exchange is a "fac-

tor in our material development as *indispensable* to its present entirety and future progress, as is either the railroad or telegraph," and that it "is a *legitimate* outcome of modern commerce, the *necessity* for which could be fully realized only in its absence" (Bisbee & Simonds, Preface, VI.), why is it that the laws of all the States either expressly provided for or permit their organization, and that the courts, American, English and French, by a long and unbroken line of authorities, adjudge such an association to be "*a lawful body, organized for lawful business purposes* (Bibb v. Allen, 149 U. S., at 489), and its rules "*to be deserving of no animadversion whatever*" (Lord Chancellor CAIRNS, 3 App. Cas., at 220), and not to be "open to objection on the ground of *public policy*" (Mr. Chief Justice FULLER, 142 U. S., at 12; SAWYER, J., in Hyde v. Woods, 2 Sawy., 655); and declare their purpose to be a "*laudable one*" (*In re* Haebler, 149 N. Y., 414, 425; State v. Chamber of Commerce, 47 Wis., at 685)?

Why, else, did a Commission embracing some of the most eminent statesmen and jurists of the age solemnly report, after thorough investigation and long reflection, that the existence of such an association, referring to one far more powerful and an infinitely greater "monopoly" than the one at bar, has "been *salutary to the interests of the public*," and, instead of recommending that steps be taken for its immediate and effective dissolution, strongly urge affirmative action "for the purpose of *strengthening its hands and increasing its efficiency* in the future" (Dos Passos, Pref., V.)?

It must certainly be conceded that it has become *a usage of the mercantile world* to establish Exchanges for the promotion of trade, and cannot justly be denied that "*the universality of a usage is conclusive proof of its being in accordance with public convenience*," (L. R., 10 Ex., at 353), and "*precisely suited to the occasion*" (2 Hill, So. Car., at 358), or that, as a result of the organization of Exchanges, "development and progress" in

commerce have resulted (69 Pa. St., at 378), thus proving the practice to be indubitably reasonable and beneficial to trade, (L. R., 4 C. P., at 48, 53).

In the light of all the considerations which have a legitimate bearing in the premises, an appeal to a judicial tribunal to overrule the conclusion of every judge, statesman, political economist, and author who has ever expressed an opinion on this most important subject, many times after exhaustive investigation and in the light of extended actual experience, may with very great propriety be answered in the language of a learned State court in a very recent case:

"It is not (would not only be) a case of the blind leading the blind, but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing, and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question. Before a judge can act intelligently in such a matter, he must have an amount of this special knowledge and experience which it will take him years to acquire. It is not sufficient that he takes his first lessons from the partisan, and perhaps perjured, experts, or so-called experts, produced by the parties at the trial," *ex gr.*, Wagoner's affidavit in the present case (Record, 253).

Steenerson v. Great Northern Ry. Co., 72 N. W. Rep., 713, 716, (Minn., 1897).

Similar views were expressed by Lord Chancellor HERSCHELL in Chartered Institute v. Lockwood, 1894, App. Cas., 347; 6 Reports, 219, 223.

The conclusion expressed by the circuit court that, at most, Exchanges were beneficial "*to the locality*" at which its members do business (Record, 270), is contradicted by the facts disclosed in many reported cases.

In Speight v. Gaunt, L. R., 9 App. Cas., at 21, Lord BLACKBURN outlined that in Great Britain a broker located at a city in which there was no organized Exchange executed his commission by means of a corre-

spondent, who belonged to one of the metropolitan bodies.

Very recently, the New York Court of Appeals decreed that "the transaction (then before it), in its essential features, is not different from *numerous others of daily occurrence.* The chief market for corporate stocks is in the city of New York. It is the *common practice* for persons desiring to purchase or dealing in stocks, *in other parts of the country*, to go to their banker and make their order, who makes the purchase or sale, as the case may be, through his correspondent in that city."

La Marchant v. Moore, 44 N. E. Rep., 770, 772 (1896).

The same course of dealing is disclosed in the carefully considered case of Skiff v. Stoddard, 63 Conn., 198. There, a broker doing business at New Haven, being charged to make certain purchases, employed members of the New York Stock Exchange to consummate the same (205), which they did by dealing with their *fellow-members* (206). The New Haven brokers charged a commission of one-eighth of one per cent. (205), being the rate fixed by the rules of the New York Stock Exchange (Dos Passos, p. 232, *n.* 2), and this was *divided* with the New York brokers (207), a course of business which the court adjudged to be "*in accordance with the uniform and recognized custom.*" (213, 216, 219).

To a similar effect:

Bangs v. Hornick, 30 Fed. Rep., 97;
Hansen v. Boyd, 161 U. S., 37;
Rosenstock v. Tormey, 32 Md., 169, 177;
Gregory v Wendell, 40 Mich., 432;
Allen v. McConihe, 124 N. Y., 342, 343;
In re Pierson's Estate, 46 N. Y. Supp., 557, 569, (1897).

So, too, many cases (the earliest one having been decided in 1712, Wilson v. Tooker, 1 Bro. P. C., 494),

recognize or decide that the market afforded by an Exchange is so manifestly superior in its general beneficial effects, that a sale of pledged property is properly made under its auspicies. The suggestion that the general public cannot attend such a sale is answered by the statement that a broker-member can readily be employed to act for all intending bidders.

Brown v. Ward, 3 Duer, 660, 662, 663;
Maryland Ins. Co. v. Dalrymple, 25 Md., 242, 261, 265;
Willoughby v. Comstock, 3 Hill, 389;
Wheeler v. Newbould, 16 N. Y., 392, 398;
Wicks v. Hatch, 62 N. Y., 535, 544.

Clearing Houses.

Lord Blackburn declared in Speight v. Gaunt, L. R. 9 App. Cas., 1, 21, that Exchanges were established "on the same principles as those which led the bankers to establish a Clearing House," and in *Ex parte* Haebler, 149 N. Y., 414, the Clearing House case of O'Brien v. Grant, 146 N. Y., 163, was cited, in connection with a number of decisions having direct reference to Commercial Exchanges, in answer to the objection that the rules of the New York Produce Exchange were "unreasonable, coercive, contrary to public policy, and invalid."

The case of O'Brien v. Grant, thus cited, affirmatively adjudged the validity of a code of Clearing House rules. That these organizations are properly regarded as prototypes of Exchanges is apparent from these points of substantial identity in the matters covered by the rules of a typical Clearing House: membership is at the option of the associates and exists subject to the conditions created by the rules; non-members are not entitled to the privileges of membership, nor to the advantages thereof; and, in many instances, *the charges to be made by members for collecting checks and drafts on*

non-residents are prescribed, as are *the rates of exchange to be charged* on drafts drawn on other cities and *of interest to be paid* on time deposits.

A well-known writer has recently said: "The Clearing House is a comparatively modern institution. It was established in London in 1775. The New York Clearing House was established in 1853; that at Boston, 1856; at Philadelphia and Cleveland, 1858; Baltimore, San Francisco, Cincinnati, Louisville, Indianapolis, and other large cities, soon after established similar institutions; so that now the chain of *Bank Exchanges* literally *goes around the world.*" (Hon. Thomas L. James, in COSMOPOLITAN MAGAZINE, March, 1897, at pp. 486, 487, Vol. XXII.)

In view of the analogy between the two organizations thus declared, it is important to note these additional facts: "The Clearing House exercises a supervisory watchfulness over the affairs of its members and bonds them all together in mutual helpfulness in time of commercial distress. The *United States Government is one of its members, and when the Treasury, embarrassed by the sudden strain of civil war, could look nowhere else for money, the New York Clearing House successfully tided it over its pressing need.* Created only for the purpose of local convenience, it has become *the mainstay of American finance in time of panic, and more than once has averted disaster to the whole business community.*" (MUNSEY'S MAGAZINE, March, 1897, pp. 672, 677, Vol. XVI.)

And yet, logically and in effect, if not in terms, the position of this complainant is that these organizations have been and are *criminal conspiracies and injurious to the public welfare!*

How, pray, is the *United States Government* to justify its membership in one of them?

That the beneficial achievements of such organizations are quite as renowned in times of peace, is clearly demonstrated in a summary of the history of the most

prominent Exchange which will be annihilated if the contentions of the present complainant are sustained: "From the year 1820, when the real history of the New York Stock Exchange may be said to have commenced, it has gone on steadily increasing in its members, *power and influence*, until today it can be safely affirmed to be *the most powerful organization of the kind in the world*; and by forming a mart where all kinds of securities can be promptly converted into cash, *it has largely contributed to the development* and wealth of the country by encouraging and sustaining our great railroad systems which have brought all parts of the Republic into a close relation to each other, and *firmly strengthened the union and prosperity of the States*".

Dos Passos, Stock Exchanges, 10.

"Exchanges have become *of incontestable value to the public.* * * It is *absolutely certain*, that without the existence of great public marts like the New York and London Stock Exchanges *the marvelous development and progress of this country, which make it the admiration and wonder of the civilized world, would not have been attained.*"

Dos Possos, Stock Exchanges, Preface, III., IV.; Bisbees & Sim., Produce Exchanges, Preface, VI.

IV.

The History, Objects, Operations, and Rules of Prominent Exchanges Considered.

The various Exchanges of the world are similar in all the respects which are relevant to this inquiry, and have been productive of careful consideration at the hands of text-writers and judges. They are also the subjects of a number of official reports, statistical and otherwise.*

*Note—As some of the publications herein referred to may not be readily accessible to the Court, copies of them have been deposited with the Clerk.

JUDICIAL DEFINITIONS OF AN EXCHANGE.

Exchanges have been judicially defined as follows:

"An association of persons engaged in the same kind of business, who have organized together for the purpose of establishing certain rules, by which each agrees to be governed in the conduct and management of his separate transactions or business. * * * Each purchase and sale is not for the joint benefit of the body, but is, *as it would be in any other place*, an individual transaction between the parties making it."

White v. Brownell, 2 Daly, 329, 336, 355, 356; S. C., 3 Abb. Pr. N. S., 318; 4 Abb. Pr., N. S., 162;

In re Haebler, 149 N. Y., 414, 428.

"The Board of Brokers is a voluntary association of persons who, for convenience in the transaction of business with each other, have associated themselves to provide a common place for the transaction of their individual business, agreeing among themselves to pay the expenses incident to the support of the objects of the association, in which each for himself, at stated hours of the day, and for his individual profit, may prosecute his own business, and enter into separate engagements with his fellow-members. *The association does not share in the losses of the individual associates; each member takes his own gains, and individually sustains the losses incident to his engagements.*"

Leech v. Harris, 2 Brewst. (Pa.), 571, 575, 576; American Com. Co. v. Chicago Live-Stock Exchange, 143 Ill., 210, 226.

"The organization of this board *grew out of a necessity* for *new and greater facilities* for exchange and negotiation incident to the rapidly developing industries of the country and the increasing number and value of its commercial securities."

Dos Passos, Stock Exchanges, 15;

White v. Brownell, 2 Daly, 329, 336, 337; S. C., 3 Abb. Pr. (N. S.) 318.

EXCHANGE—"A voluntary business association formed by its members for the purpose of buying and selling among each other, either as principals in their transactions, or as agents acting for parties who are not members of the body, and having a code of laws regulating the admission, conduct, suspension and expulsion of members. * * * It is a comparatively modern institution, and *has been developed step by step in response to the demands of business necessity*."

23 Am. & Eng. Ency. of Law, pp. 749, 750, 751.

"A voluntary association of persons by which each individual broker is enabled to carry on his separate business, under regulations made alike for the protection of himself and his client or principal."

Dos Passos, Stock Exchanges, 13, 15.

As recited in many of the special charters granted to various of these bodies and of the general statutes providing for their organization, and also in the preamble to nearly all the rules and regulations hereinafter noticed, "its general objects are the *promotion of trade* * * and prescribing rules and regulations under which it may be done."

Pitcher v. Board of Trade, 20 Ill. App., 319, 324, 325.

In the course of the existence of these several bodies, their status and attributes, and the validity of their various rules, have been many times considered.

THE PARIS BOURSE.

The PARIS BOURSE was harrassed for centuries by the efforts of persons who sought to enjoy the benefits of membership, which the organization limited to sixty, and who became known as *coulissiers*, occupying a rela-

tion much as do "curbstone brokers" of the present day. They charged *smaller commissions* than those prescribed by the rules of the Bourse and operated without the delays imposed by the organized body. By a judicial decision rendered in 1859, the right of the Bourse *to thus limit its membership to sixty persons* and the benefits of its controlling influence to its own members was judicially declared, and its competitors suppressed. The latter included "two hundred banking houses of great solidity." (Dos Passos, 331, 335.) The rules of this body are summarized *post.*

The London Stock Exchange.

The London Stock Exchange is doubtless one of the most potent commercial factors in the world.

Its origin and growth have been thus summarized:

"It was the custom toward the close of the seventeenth century for brokers and jobbers to congregate about the Bank of England, and they were given authority by statute to carry on their dealing in the rotunda of that building. (5 and 6 W. & M., c. 20, sec. 20.) But in 1698 the approaches thereto became so obstructed, that they were compelled to move their quarters to Change Alley. At length *the more respectable brokers* hired a house in Capel Court, to which any one desiring to buy or sell stock was admitted on payment of a small fee. So many *objectionable persons*, however, found an entrance under this arrangement that it became *necessary* to adopt some other method. Accordingly, in 1801 the present Stock Exchange was organized."

Lewis, Stocks etc., pp. 10, 11.

As disclosed by cases already cited, many of the rules of this body have been subjected to judicial scrutiny.

Primarily, the courts have at all times expressed their appreciation of the magnitude and importance of the interests at stake.

In a case decided in 1840, Lord ABINGER noted that the question involved "undoubtedly is one of a very important character, as it involves the practice of the Stock Exchange generally."

Mortimer v. McCallan, 6 M. & W., 58, 66.

Another case was declared to be "very important, in a general point of view, because it relates to transactions of great multiplicity and enormous amounts upon the Stock Exchange."

Merry v. Nickalls, 7 Ch. App., at 740, note.

The rules of this organization were attached to the record in Bowring v. Shepherd, L. R., 6 Q. B., 309, 313, note 1, and in deciding the case the Court noted "the vast amount of dealings upon the Stock Exchange through the medium of brokers." (322).

The failure of Overend, Gurney & Co. gave rise to a series of cases in which every attack which the ingenuity of the leaders of the English bar could suggest, was vigorously pressed. There were earnest discussions and differences in the law courts and in the chancery division, but no word of hint or criticism came from the bench or bar that because the Exchange was "an absolutely close market and no person who is not a member can enter its walls, the only access of the outside public being through a broker," (Stutfield & Cantley, London Stock Exchange, 22, 27; Melsheimer, Stock Exchange, 5), or for any other reason, its rules were in restraint of trade (reasonably or unreasonably), or the body itself a monoply.

Grissell v. Bristowe, L. R., 3 C. P., 112; S. C., L. R., 4 C. P., 36, 49;

Coles v. Bristowe, L. R., 4 Ch. App., 3;

Maxted v. Paine, L. R., 4 Ex., 203; S. C., L. R., 6 Ex., 132;

Nickalls v. Merry, L. R., 7 H. L., 530.

In *ex parte Ward*, 20 Ch. Div., 356, a learnedly constituted court construed the two rules by which members alone were recognized in dealings had on

'Change, and prohibiting a resort to the courts by one member against another to determine disputed matters between them, without the consent of the defendant or of the Governing Committee. (Melsheimer, Stock Exchange, 78, 79).

In Seymour v. Bridge, 14 Q. B. D., 460, 465, (also by FRY, L. J., in Smith v. Reynolds, 66 L. T. Rep., N. S., 808, 810), it was said that the rule that none but members will be recognized by the Exchange "is so binding that the consequence to the brokers (of a violation) would be their expulsion from the Exchange as defaulters, or their being made liable by a summary order of the Committee, in case they did not fulfill the contract they had entered into."

In Davis v. Howard, 24 Q. B. Div., 691, a rule by which a broker was authorized to close out his principal's account on non-payment of the balance due was adjudged to be reasonable.

RULES OF THE LONDON STOCK EXCHANGE.

At this point it is interesting to examine the rules thus declared not to be "deserving of any animadversion whatever;" to "be judicious and business-like;" and to constitute "an honorary agreement" binding on the members, whose existence was "a great matter" to the public. (Tompkins v. Saffery, L. R., 3 App. Cas., 220, 227, 228, 232, 238). They are set out in full on pages 849 to 894 of Dos Passos on Stock Exchanges.

The privileges of the Exchange *are strictly limited* to members and their authorized clerks. (p. 264.)

Members may be suspended or expelled for violating any of the rules, for failing to comply with any of the governing committee's decisions, and for dishonorable or disgraceful conduct. (Rule 16, p. 853.) Public notice of such suspension or expulsion may be given and no right of action shall accrue by reason thereof. (Rule 17, p. 853.)

"No applicant is admissible if he be engaged as principal or clerk *in any business other than of the Stock Exchange* (a clause which a learned American Court has declared to be free from legal objection, 136 N. Y., at 341), or *if his wife be engaged in business*, or if he be *a member of, or subscriber to, any other institution where dealing in stock or shares are carried on;* and if, subsequently to his admission, he shall render himself subject to either of these objections, he shall thereby cease to be a member" (Rule 28, p. 855); and the printed form of application for membership requires a declaration to the same effect. (pp. 858, 859.)

"No member shall be allowed to *enter into partnership with any person who is not a member.*" (Rule 39, p. 861.)

"The Stock Exchange does not recognize in its dealings *any other parties than its own members.*" (Rule 51, p. 865.)

"If a member shall do a *private bargain*, either for money or time, with an individual member of a firm in the Stock Exchange, such bargain being concealed from the firm, both members shall be expelled. If any member or authorized clerk shall do a bargain, either for money or time, with an authorized or unauthorized clerk, for account of such clerk, they shall be liable to expulsion." (Rule 54, 55, p. 866.)

All disputes concerning dealings *must* be arbitrated. (Rule 63, p. 867.)

The manner of making contracts and of closing them is elaborately sketched. (Rules 66, 142, pp. 868, 887.)

"Bonds will not be admitted to quotation until they have been approved by the committee" (p. 883), nor shares of a new company. (Rules 129, 130, p. 884.)

It has been ruled that a contract for the sale of bonds may be rescinded on proof that they have not been admitted under these rules, for the reason that

unless so admitted they are not a *marketable commodity.*

Young v. Cole, 3 Bing. N. C., 724 (1837).

And procuring securities to be listed by the Exchange by means of fraudulent representations to the proper committee has been adjudged to be *an indictable offense.*

Reg. v. Aspinall, 1 Q. B. D., 730; affirmed, 2 Q. B. D., 48.

In this case the learned justices composing the Court of Appeal each took judicial notice that the action of an Exchange in admitting or excluding property desired to be sold under its auspices and the protection of its rules *greatly affected its value.* And yet no one, judge or counsel, supposed that *a refusal to admit such property* would be in restraint of trade, or that the rule requiring such admission tended to a monopoly.

Reg. v. Aspinall, 2 Q. B. D., 48, 61, 62, 63, 64.

There is an additional rule, which was probably the forerunner of the provisions in the codes of the American Exchanges concerning solicitors, prepaid telegrams, and the like, to the effect that "members of the Stock Exchange are not allowed *to advertise for business purposes* or to issue circulars to persons *other than their own principals.*" (Melsheimer, Stock Exchange, 7.)

The English reports disclose that Stock Exchanges also exist at the following cities:

LIVERPOOL:

Stewart v. Cauty, 8 M. & W., 160, (1841);
Bayliffe v. Butterworth, 1 Ex., 425, (1847);
McEwen v. Woods, 11 Q. B., 13, (1847).

MANCHESTER (where "there was a vast quantity of business transacted"):

Fletcher v. Marshall, 15 M. & W., 755, (1845).

HULL:

Bowlby v. Bell, 3 C. B., 248, (1846).

LEEDS:

Pollock v. Stables, 12 Q. B., 765, (1848).

It was stated by Lord BLACKBURN, in Speight v. Gaunt, L. R., 9 App. Cos., at 21, that the rules of these several bodies are substantially like those of the parent Exchange at London.

THE NEW YORK STOCK EXCHANGE.

The cases concerning the New York Stock Exchange are very numerous and the phraseology of its rules bears a closer resemblance to those of the Exchange in question, embodying, as they do, the machinery for transacting business in this country.

Indeed, this Court, in recognition of the great volume of business which is done through the various Exchanges in the State of New York, and because of the great consideration which has been given by the courts of that State to the questions arising out of the operations of such associations, has expressed a decided disposition to follow the cases there decided.

Galigher v. Jones, 129 U. S., 193, 202.

The earliest case on the subject has become the leading one in American jurisprudence. The plaintiff sought to enjoin a suspension from membership which had been pronounced against him for non-compliance with an award of the arbitration committee. The right to transact business on the floor of the Exchange was exceedingly valuable and *was strictly limited to members.* The court, after defining an Exchange as heretofore quoted and warmly commending its purposes, held that membership therein was merely *a matter of contract;* that it could be conferred and withheld at pleasure; that when granted it was conditional upon compliance with the rules and ceased when a violation thereof had been adjudged by the tribunal designated by such rules.

"It follows from the very nature of such an organization that there must be rules and regulations for the order of the association, which rules should be held *to*

be conclusive as to the mode of transacting business between the members, and as to the privileges *of admission to and continued enjoyment of membership.* * * * * *No person is entitled to membership unless properly admitted.* Each member should stand by his contract. Each member is under an obligation to support it himself, *in all its details*, and is under a duty to see that it is supported by others. * * * *The very existence of this body depends upon the faithful observance of its organic law by all of its members.* * * He can not invoke the aid of this court to protect him in all the rights and advantages of the association, which he alleges are *a great source of benefit to him*, and still be allowed to disregard his duties under the constitution and the laws of the board. * * * The constitution must be taken *as a whole.* The contracting parties *as an entirety.* (To the same effect, *Ex parte* Grant, 13 Ch. Div., at 679). *All its obligations* are to be assumed and discharged; all its benefits are to be enjoyed. *The enjoyment of the latter depends upon the performance of the former. Were it otherwise the association would be of no real advantage to its members.* * * Good faith in the observance of the contractual obligations of the members was intended to furnish a test for the continued right of membership."

White v. Brownell, 2 Daly, 329, 337, 338, 341, 342; also, 3 Abb. Pr., N. S., 318.

On appeal these rulings were affirmed (2 Daly, 343; also, 4 Abb. Prac., N. S., 162), an exhaustive opinion being delivered by the learned Judge DALY, the conclusion of which was that "the law cannot compel such an organization to admit an individual to membership, nor can it interfere to restore a member who has been deprived of the privilege for not complying with the conditions upon which the enjoyment of it was made to depend" (2 Daly, at 358).

Even though it was not decided by the Court of Appeals, this case has become a leading one, and

it is universally cited and recognized as a correct exposition of the law. (Greer v. Stoller, 77 Fed. Rep., 1, 8, and cas. cit.; Haight v. Dickerman, 19 N. Y. Supp., 559, 560.) And it was substantially adopted in the subsequent litigation to which it gave rise. It was there held that an agreement on the part of the principal of that suspended member to indemnify him in the premises was supported by *a lawful* consideration.

White v. Baxter, 9 Jones & S., 359; affirmed, 71 N. Y., 254.

To the same effect,

Harker v. Edwards, 57 L. J., Q. B., 147.

It is an important consideration that each of the multitude of cases supporting the propositions announced in White v. Brownell, *supra*, by necessary implication, adjudges *the lawfulness of the organization* in question. Otherwise, upon what principle treat membership as *valuable*, and consequently not as evidence of participation in a criminal conspiracy, as is done in the cases arising under illegal trust combinations? Why is membership held to be a matter of contract, and the right adjudged to withhold the same? Why declare the constating instruments to embody a valid contract?

These considerations, in view of the nature of the litigation under review, of the magnitude of the interests involved, the publicity of the rules of the organizations in question, and of their intimate connection with and powerful influence upon every branch of business, however negative in their character they may be said to be, are strong authorities to warrant the conclusions we state. As Lord Chancellor HERSCHELL well said in a recent case, "If the law be otherwise, the number of cases must have been almost innumerable in which the contrary would have been contended for and held."

Chartered Institute v. Lockwood, 1894, App. Cas., 347; 6 Reports, 219, 229;

Canning v. Farquhar, 16 Q. B. Div., 727, 731; Stephens v. Southern Pac. R. Co., 109 Cali., 86, 95.

The assertion of the complainant that the cases commending such bodies, and approving their rules, were all decided *prior* to the enactment of Anti-Trust statutes, so-called, is not borne out by the facts. As already shown, the rulings of the Interstate Commerce Commission, reported to and acquiesced in by Congress, and, indeed, the affirmative action of Congressional committees on numerous occasions, have been as commendatory of Exchanges since 1890 as they had been in previous years. A number of the cases cited have been decided since the Congressional Act of 1890 was passed, and similar statutes had long existed in many of the States (notably in New York and Illinois,) whose courts have considered the status of Exchanges and the validity of their rules.

This court has given such bodies recognition as lawful and beneficial in at least *four cases* decided since July 2, 1890.

The General Assembly of New York has repeatedly declared its estimate of these bodies and of their functions in respect of the trade of that great commercial community. Thus by an act approved April 19, 1862 (N. Y. Laws, 1862, chapter 359), a corporation was specially chartered "to provide and regulate a suitable room or rooms for a Produce Exchange in the city of New York, *to inculcate just and equitable principles in trade, to establish and maintain uniformity in commercial usages*, to acquire, preserve, and disseminate valuable business information and to adjust controversies and misunderstandings between persons engaged in business," (§3), and it was provided that awards made by its committees should form the basis of a conclusive judgment of the Supreme Court of that State (§ 7). By an act of February 13, 1868, (New York Laws, 1868, chapter 30), the name of the

former corporation was changed to its present one: New York Produce Exchange.

The preamble to the rules of that body is fully set forth in Hurst v. Produce Exchange, as reported in 3 N. E. Rep., 42, 45, 48, and the effect of an award under its rules was considered in Sonneborn v. Lavarello, 2 Hun, 201.

In a very recent New York case decided upon the subject (1896), it was said, referring to Exchange thus chartered, that "the purpose of the organization is a *laudable one*."

In re Haebler, 149 N. Y., 414, 425.

In Grocers' Bank v. Murphy, 60 How. Pr., 426, Judge VAN BRUNT, after describing the aims and purposes of the New York Stock Exchange, said that "by reason of this aggregation of men engaged in a particular business, and by reason of *the facilities and securities which this combination affords to its members*, the privilege of forming one of this association becomes valuable." (430.)

And in Londheim v. White, 67 How. Pr., 467, 473, its rules were said to be "*reasonable*."

In Commercial Telegraph Company v. Smith, 47 Hun, 494, 505, the status of the New York Stock Exchange was thus defined: "It is just as much *a master of its own business and of the methods of conducting the same* as any private individual within the State."

In Belton v. Hatch, 109 N. Y., 593, 596, 598, it was said of the same body that "its principal object is the promotion of the convenience of its members by furnishing facilities which aid them in doing their business and are, therefore, of benefit to them," and that it constituted a "*business club*." After stating that by wise and successful management, and the acquisition of valuable facilities for the transaction of business, membership therein had become exceedingly valuable, it was further said: "It is fair to presume that this prosperity and success were, in an important degree, due to

the regulations adopted looking to the conduct, by a member, of his business and the restraints imposed *upon reckless or dishonest methods.*"

This Court, in considering a membership in that body, referred to the rules governing such membership, and said that they "*are not open to the objection on the grounds of public policy.*"

Sparhawk v. Yerkes, 142 U. S., 1, 12, (1891).

And a learned judge declared that the good will of that Exchange was attributable to "*a long and honorable career, and the high character of its members.*"

Wilson v. Commercial Tel. Co., 3 N. Y. Supp., 633, 635; 18 N. Y. State Rep., 178.

In the June, 1897, number of LAW NOTES, (p. 35), published by the Edward Thompson Company, appears this account of an exceedingly pertinent case:

TAXATION OF STOCK EXCHANGE SEAT.—William S. Brigham, a New York stock broker, when proceedings were recently instituted in the Supreme Court of that city to compel him, as a non-resident, *to pay taxes upon his membership in the Stock Exchange*, as being *property invested by him in his business*, contended that the value of his "seat" in the Exchange did not represent money invested in his business. Justice BEEKMAN decided adversely to this view, and directed that an order issue for the payment of this tax. "The right to trade upon the Stock Exchange," Justice BEEKMAN said, "is *highly important, if not absolutely essential, to the conduct of the business of buying and selling stocks and bonds, as the market is controlled by the Exchange, and access to it is confined to its members.* How highly the privilege is valued from a business point of view is shown by large sums which brokers are willing to pay for it. It is part of *the plant or machinery*, so to speak, *through which the business is done.*"

See also,

McCabe v. Emmons, 51 N. Y. Superior, 219;

Weston v. Ives, 97 N. Y., 222, (a suspension for

doing business in a reckless and unbusiness-like manner);

Kuehnemundt v. Smith, 2 N. Y. Supp., 625; 17 N. Y. State Rep., 757, (an expulsion for fraudulent conduct).

Origin and Rules of the New York Stock Exchange.

The New York Stock Exchange had its origin in an agreement, dated May 17, 1792, partially set out in Don Passos on Stock Exchanges (9), and in full in a very valuable history of American Exchanges, published by Messrs. O. W. Clapp & Co. in 1894, as follows:

"We, the subscribers, brokers for the purchase and sale of public stocks, do hereby solemnly promise and pledge ourselves to each other that *we will not buy or sell from this day, for any person whatsoever, any kind of public stock at a less rate than ¼ per cent commission* on the specie value, and that we will give *a preference to each other in our negotiations.*" (Clapp, 239.)

In a general way the constitution and by-laws now prevailing are stated to "set forth the manner in which business shall be conducted, *the rates of commission to be charged*, and the acts or omissions which constitute a ground for dismissing a member." (Dos Passos, pp. 12, 13.) It is also stated that "*a uniform rate of commission is fixed* which is generally observed," and the minimum rates prescribed are set forth. (Dos Passos, p. 232, note 2.)

The constitution and rules are set out in full on pages 809–845 of the treatise last referred to, some of which deserve to be noticed as being the model upon which all other American Exchanges are formed, and because of their similarity to the regulations which the Court is asked to condemn in the present case.

As the members of that Exchange sell property belonging to non-residents and persons residing in other States, oftentimes for delivery there, even in its "original package;" as the telegraph is used in their transactions; as, oftentimes, solicitors are sent to and advertisements published in other States of the Union; as drafts drawn by or on persons or books in such other States form a conspicuous feature of their transactions; and as their negotiations are many times partly in one State and partly in another, and concern property then situate in a different State, that body is quite as much engaged in interstate commerce as are these defendants. Indeed, the same may be said of nearly all Exchanges. It needs but a glance at the location of the given city and the nature of the business done to demonstrate this conclusion: Witness, the Chicago grain trade described in Munn v. Illinois, 94 U. S., 113, 130, 131, and the business done by the members of the Chicago Live Stock Exchange set out in American etc. Commission Co. v. Chicago etc. Exchange, 143 Ill., 210, 212, 213, 226.

The affairs of the New York Stock Exchange are controlled by a Governing Committee (Art. II., p. 809), which is given *supreme power*. (Art. III., p. 810.)

Members are admitted at the will of a committee on Admissions. (p. 812.)

All securities must be approved and ordered listed by an appropriate committee before members are permitted to deal in them. (pp. 812, 813; Art. III., IV., p. 829.)

A committee on Commissions is provided for, "whose duty it should be to see that *the rules relating to commissions are complied with*, and report to the Governing Committee any violation thereof." (p. 814.) The latter committee has power to try all offenses and "their decision shall be final." (Art. III., section 1, p. 840.) Article XVIII. is devoted to the subject of *commissions*, section 1 of which provides that "com-

missions shall be charged and paid, *under all circumstances*, both upon the purchase and sale of stocks, bonds, and other securities, either for members of the Exchange or for other parties," and the *minimum rates* are set forth in detail. (pp. 821, 822.)

These rules have been construed to require a commission to be charged to *each party* on an exchange of or "turn" in stocks (p. 821, note), which is also the practice on the London Stock Exchange, a practice to which the Royal Commission of 1877 reported "*it is hardly possible to object.*" (p. 255, note.)

The New York rule has also been construed in such a way as to forbid any *evasion* of its terms and the making of exceptions from its requirements, by way of *rebate, bonus or otherwise.* (p. 822, note.) It is also provided that "any member violating this article, directly or indirectly, shall, upon conviction, *cease to be a member*, and his membership shall *forthwith be disposed of* by the Committee of Admissions." "Any member who shall be convicted of *offering* to do business for less than the foregoing rates" shall be deemed to have violated the rule. (p. 823.)

A "discrimination" is provided for, in that non-members must be charged *one-eighth* of one per cent., while fellow-members may be served for *one thirty-second* of one per cent., and, under certain circumstances, for as little as *one-fiftieth* of such per cent. (821, 822.)

In 1889 the initiation fee was fixed at $20,000 (Art. X., Section 2, p. 816), and every member was required to sign a pledge "to abide by all then existing or subsequent enacted rules, by-laws or regulations." (Art. XXI., p. 823.)

Every member is obliged to keep a prescribed place of business and to notify the Exchange of any partnerships entered into by him and of all dissolutions (Art. XII., p. 817), and is prohibited from forming *a partnership with a suspended member, an insolvent person, or a former member who has not fully adjusted all claims held*

against him by members of the Exchange. (Section 5, p. 820.)

Members guilty of obvious fraud shall be expelled (Art. XX., p. 823), and for any violation of the rules, shall be subject to such penalty, including suspension or expulsion, as the governing committee may see fit to impose. (Section 2, p. 824.)

Art. XXII. provides that "any member who shall himself, or whose partner or partners shall, *apply for an injunction* or legal instrument restraining an officer or committee of the Exchange from performing his or its duties under the Constitution and By-Laws shall *by that act* cease to be a member of the association." (p. 824.)

Dealings are limited *to the interval between certain prescribed hours*, and transactions in any public place outside of the Exchange are likewise prohibited. (Section 1, p. 828.) The manner of transacting business is prescribed in great detail, (pp. 828, 837).

By-Law XIX. provides that "any member *uniting*, directly or by a partner, *with any organization where stock, bonds, etc., are dealt in*, shall cease to be a member of this Exchange" (p. 837), and also that "any member dealing *with a person not a member*, in the rooms of the Exchange, shall be subject to suspension." (p. 838.)

Any member failing to pay fines within the times limited shall stand suspended or cease to be a member. (Art. XX., p. 838.)

No persons except members are permitted to have access to the minutes. (Art. XXV., p. 840.)

Members are required to submit claims to the Arbitration committee even *at the request of a non-member.* (p. 813, and Art. XXVIII., p. 841.)

Instead of these regulations operating in *restraint of trade*, the records show that in 1886 the sales on that Exchange reached the enormous aggregate of $6,506,087,614! Even during the depression which

made the year 1894 so sadly memorable, they aggregated $3,404,897,951! (Clapp, 239). And it has very recently been stated that "the Stock Exchange is *certainly the heart of the business life of New York*. There are Stock Exchanges *in every large city in the world*, and a generic likeness pervades them." (CENTURY MAGAZINE, February, 1897, p. 503, Vol. 53.)

It now embraces, by merger and consolidation, the members of a number of stock boards which had been formed in New York from time to time. (Clapp, 15.) *Membership is limited to 1,100 persons* (Clapp, 15), and the judicial annals disclose that such memberships have sold for as much as $33,000 and $34,000! (London Agency Co. v. Morphy, 12 Am. and Eng. Corp. Cas., 53, 70; Sparhawk v. Yerkes, 142 U. S., 1, 4; Platt v. Jones, 96 N. Y., 24, 29.)

Assuming $35,000 to be the present value, it will be observed that the value of the 1,100 memberships in that body alone represents an aggregate of $38,500,000, which would not only be rendered valueless, but also made to represent participation in a criminal conspiracy, if the present action is well taken. There is no objection to the Exchange under review that does not apply, with ten-fold force, to the New York Stock Exchange. It is important to remember, as already noted, that the State of New York has long had a statute prohibiting contracts, combinations and conspiracies, intended and having the effect to injure trade, which have been construed to include all arrangements in restraint of trade, some of which were unobjectionable under common law rules, and which have been vigorously enforced by the courts of that State. (See some of the cases digested by Judge SANBORN, 58 Fed. Rep., at 70.) The same courts, as shown by the quotations already made, have commended Exchanges in the highest terms and declared that their evolution was due to the *demands* of *business development*, and their usefulness to a "*long and honorable career and the high standing of its members;*" that their

purpose was "a laudable one" and their rules "not open to objection on the score of public policy."

STOCK EXCHANGES EXIST ALSO IN BOSTON, PHILADELPHIA, CHICAGO, SAN FRANCISCO, TORONTO, AND MONTREAL.

1. The BOSTON STOCK EXCHANGE was organized in 1834; membership is limited to 150, and quoted to be worth about $12,500. (Clapp, 259.) Its rules have been judicially declared to embody "an *appropriate means* for the quick and economic transaction of large volumes of business."

Dillaway v. Alden, 88 Me., 230, 236.

2. The PHILADELPHIA BOARD OF STOCK BROKERS came into existence early in the century and its rules furnished the model for those of the present New York Stock Exchange. (Dos Passos, p. 9.) It, well as the San Francisco Exchange, hereafter noticed, are both *unincorporated associations.* (Dos Passos, p. 12 *n.* p. 1.) A summary of the rules of the Philadelphia body is to be found in a case which ranks next to White v. Brownell, 2 Daly, 329, in this branch of the law, fixing, as it does, the limitation upon the power of such bodies to discipline their members. It was there pointed out that the rules of the Philadelphia Stock Exchange authorized the suspension of members for failing to make good loans from members, or an overdraft at a bank; for purchasing or selling stocks for a minor or clerk without the consent of the parent, guardian or employer; for advertising certain loans, stocks or bonds for sale; "*for doing business for a less commission than the rates provided for;*" for attending any other room than the Exchange for the purpose of buying or selling stock; and for indecorous language or conduct to members in or the board itself while in the board room.

Leech v. Harris, 2 Brewst., 571, 576, 577, 589.

These rules have been judicially declared to be "*a law as to the members.*"

Thompson v. Adams, 93 Pa. St., 55, 66;
Pancoast v. Gowen, 93 Pa. St., 66, 71.

The rule that the proceeds of the sale of a membership were primarily chargeable with the payment of damands due to members was declared to be valid in Singerly v. Johnson, 3 W. N. C., 541; Leech v. Leech, 3 W. N. C., 542, *note;* and Moxey v. Stock Exchange, 14 Phila., 185; affirmed 9 W. N. C., 441.

A suspension for non-payment of assessment was upheld in MacDowell v. Ackley, 8 W. N. C., 464, the court saying (467) that no person could enjoy the benefits of an Exchange membership with performing his obligations under the rules.

The record of sales kept by its clerks are competent to prove the value of an article on a given day.

Esser v. Linderman, 71 Pa. St., 76, 79.

That body had 230 members in 1894 (Clapp, 333), and membership therein has been recognized to be worth $8,000.

Sparhawk v. Yerkes, 142 U. S., 1, 4.

The Stock Exchange is quartered in the Philadelphia Bourse, a building costing $1,350,000. (Clapp, 265.)

3. The CHICAGO STOCK EXCHANGE is the outgrowth of several similar organizations dating back to 1864, and an unincorporated body. Its membership is limited to 445, and seats have a value of $1,500 each. (Clapp, 261.)

4. The SAN FRANCISCO STOCK AND EXCHANGE BOARD was organized in 1862. Its Constitution and By-laws (revision of 1892) contain the following provisions:

Membership is *limited* to 100. (Art. II.)

"No member of the Board *shall belong to any similar organization* in this State under penalty of immediate expulsion." (Art. XI.)

Rates of commission shall be regulated by the By-laws. (Art. XVII.)

No stocks or bonds shall be called unless first approved and listed (By-law 2), for which certain fees are charged. (By-law 3.)

"No assembly of members outside the Board-rooms, for the transaction of stock business, shall at any time be allowed." (By-law 9.)

"No member shall transact any business in mining stocks, as a stock broker," *for less than the rates of commission fixed.* "Nor shall any member be permitted to evade this By-law, by means of *any rebate, deduction, or allowance.*" For the first violation, a fine of $5,000 shall be imposed and the offender shall stand suspended until the same is paid. For the second offense, an additional penalty of thirty days' suspension is provided for. (By-law 25.)

"*No member shall employ, directly or indirectly, a non-member* to buy and sell mining stocks dealt in at the Board, under a penalty of $1,000 for each offense." (By-law 29.)

Notice of defaults by members is publicly given. (By-law 35.)

Non-members may compel members to submit matters to arbitration. (By-law 36.)

A member against whom an award is made shall stand suspended until he has complied with the same. (By-law 37.)

No member shall employ or have a partner or employee in any capacity whatever, a member, or the clerk of a member, of *any similar organization.* The names of all partners must be reported to the President. (By-law 38.)

All clerks and employees must be registered. Dealings with clerks or employees must be reported to the employer. Clerks shall not be allowed to trade on the floors of the Board. (By-law 39.)

"The bids or offers for the purchase or sale of shares of stock shall, during all regular and informal

sessions of the Board, be *exclusively confined to members thereof.*" (By-law 42.)

It has been judicially said the rules of this body "are essentially the same as those of other Stock and Produce Exchanges in New York and other cities of the Union," (Habenicht v. Lissack, 78 Cal., 351, 352), and that all Exchanges "seem to have been framed upon the same model." (Lowenberg v. Greenbaum, 99 Cal., 399.)

Judge SAWYER ruled: "*I find nothing in the organization, constitution or by-laws of this organization in contravention of the law of the land.*" (Hyde v. Woods, 2 Sawy., 655, 656, 659, 660; affirmed, 94 U. S., 593.)

Membership has been found to be worth $6,000, as long ago as 1885 (Clute v. Loveland, 68 Cali., 254, 258), and adjudged to be conditional upon continued compliance with the rules of the Exchange. (Rorke v. San Francisco Stock Board, 99 Cali., 196.) The by-laws and rules of such an association "bear the same relation to the association as do charters by the legislature to private corporations." (Levy v. Magnolia Lodge, 110 Cali., 297, 310.)

5. Stock Exchanges exist also in Toronto, (Agency Co. v. Morphy, 10 Ont. Q. B., 86; 12 Am. & Eng. Corp. Cas., 53, 63, 65; affirmed, 14 Ont. App., 577; 21 Am. & Eng. Corp. Cas., 371), and in Montreal, the latter having originated in 1822, and having, in 1894, a membership of 1,000, and owning a magnificent building (Clapp, 331), costing over $600,000. (See Annual Report, Montreal, 1896, p. 62.) The Birmingham Stock Exchange came under notice in Terry v. Birmingham Bank, 99 Ala., 566.

RULES OF THE PARIS BOURSE.

6. Before passing from this sketch of Stock Exchanges, the history and rules of the PARIS BOURSE deserve brief notice, as it is the most important body of that nature existing in continental Europe. It was

organized as early as 1304, (Dos Passos, 324.) In 1723 stock dealings *at any other place* were forbidden under heavy penalties. (325.)

It was closed by a decree of the French Revolution. And it merits serious consideration that *this is the only act unfriendly to such bodies which history records*; and it can hardly be supposed that the spirit which permeated the French Revolution actuated an *American Congress* in the enactment of the statute under consideration and *President Harrison* in affixing his signature thereto. On the contrary, it is to be presumed that Congress intended that "which best comports with the genius of *our* institutions." (Texas & Pac. Ry. v. Commission, 162 U. S., at 218.) Such an intention on the part of Congress is likewise rebutted by the historical fact that even the revolutionary suppression of the Paris Bourse "was of but *short* duration, for by a decree of the *very same year* it was re-established." (Dos Passos, 326.)

The State furnished the ground for a building, and the City of Paris paid the cost of the structure, amounting to 8,000,000 francs, over $1,500,000 of our money. Napoleon himself laid the corner-stone. (326.)

The present rules were framed in 1816 and are set out in Dos Passos. (pp. 897-944.)

Membership is *limited to sixty* and has not since been increased. (327, 328.) "They are generally men of large capital, doing a most extensive and valuable business." (321.)

All efforts to interfere with their business, however strongly supported and vigorously urged, have been *suppressed by the courts*. (334, 335.)

The governing committee fixes the *minimum commissions* which are to be charged. (335, 336.) The table in existence in 1877 is set out on pages 943, 944.

Members must possess certain prescribed qualifications. (Ch. I., p. 898).

The Syndical Chamber has supreme and final

authority in all disputes and contests that may arise between members. (Art. 20, p. 902.)

No member is allowed to employ more than two head-clerks. (Art. 59-64, pp. 908, 909.)

Members cannot form partnerships between themselves (Art. 67, p. 910); nor transact business with any employee of a fellow-member; nor *share their commissions with any one.* (Art. 69, 70, p. 910.)

"The Syndical Chamber annually fixes the *minimum commissions.* * * The tariff of commissions is sent to every member and *all are bound to comply with it.*" (p. 911.)

No member can begin or carry on *an action at law* without the previous consent of the Syndical Chamber (Art. 76, p. 911), nor have his offices in a building already occupied by a fellow-member. (Art. 77, p. 911.)

On suspension, a member is prohibited *from entering the Exchange.* (Art. 79, p. 911.)

No security can be sold without having first been approved and listed by the Syndicate Chamber. (Art. 155, *et seq.*, pp. 926 *et seq.*)

In 1881, it was stated that "a broker's seat (in this body) is worth from a million and a half to two million francs and cannot be sold without the consent of the Governing Committee."

Lewis, Stocks etc., p. 12.

Produce Exchanges.

The four most important of the Exchanges in this country which are devoted to dealings in grain and other similar products are the Chicago Board of Trade, the New York Produce Exchange, the St. Louis Merchants' Exchange, and the Kansas City Board of Trade, the rules of which are, in the respects now under consideration, of the same general nature as those of the American Stock Exchanges already noticed, and,

in all essential features, the same in each of the bodies.

Chicago Board of Trade.

The Chicago Board of Trade was organized in 1848 and incorporated in 1859, for "the *promotion of trade*" (20 Ill. App., at 324, 325). It owns a building which cost $1,840,000. It has about 1,900 members and the initiation fee is $10,000. (Clapp, 301.)

Its rules and regulations are set out in an Appendix to Bisbee & Simonds on Produce Exchanges, pp. 303–358. That treatise was published in 1884; so that the rules in question were public to the world *at least six years* prior to the passage of the Act of Congress of July 2, 1890. In point of fact, the rules of all the bodies referred to in this compilation have ever been accessible to the public and a matter of notoriety; witness the many quotations from them in the various judicial decisions herein cited.

The Chicago Board of Trade is governed by a board of directors (Bisbee & Simonds, 303, 306,) which has power to suspend or expel a member for failing to comply promptly with the terms of any business contract or obligation, or with an award of the arbitration committe; for improper conduct of a personal character in the rooms of the association; for wilfully violating any business contract or obligation; for violating any of the rules, regulations and by-laws of the Exchange; for making or reporting any false or fictitious purchases; andfor any other dishonorable or dishonest conduct. (308,309.)

Sections 7 and 8 of Rule IV. of the Kansas City Live Stock Exchange (Record, 31, 32) are practically transcripts of these provisions.

Rumors or other information ofa grave offense against the good name and dignity of the Exchange are required to be promptly investigated, and, if well founded, steps taken to prosecute the offending member.

(Chicago, Bisbee & S., section 15, pp. 310, 311; K. C. Live Stock, Rule IV., section 13, Record, 35).

In all hearings before the Arbitration Committee, the rules are to be construed "as being designed to secure *justice and equity in trade*." (Chicago, 319, Kansas City, Rule VII., section 1, Record, 37).

Membership is at the will of the Board of Directors. (323.)

Visitors are not permitted to negotiate or transact any business in the Exchange rooms. Rule XIII., p. 323.)

By sections 3 and 4, Rule XV., the "*established minimum rates of commission governing members of the association*," are prescribed. (325, 328.) "*No rebate, drawback, division of commissions, or any other allowance, directly or indirectly, shall be permitted or excused.*" (328.) No member is permitted to do business for a non-member on a salary. (328.) "Any violation or evasion of this rule shall be deemed and held to be an act of bad faith and conduct of so *dishonorable a character* as to render a member guilty thereof to the *severest discipline* authorized by the rules of the Board of Trade." (328.) For the first offense, the punishment is suspension or expulsion, and for the second the Board of Directors *must* expel him. "The name of the party so convicted shall be posted on the bulletin of the Exchange." (329.) A reward of $500 may be paid for proof of such violation. (329.)

Rule XX. fixes the places and hours for trading, "it being the object and intent of this rule that *all such trading* which may tend to the maintenance of a public market" *shall be thus confined.* (331.)

The regulations for trading are framed in great detail. (332–352.)

These rules have been many times before the courts of Illinois, Federal and State, and there is no hint or suggestion of their illegality in any of the cases.

In Roundtree v. Smith, 108 U. S., 269, (1883), the plaintiffs were awarded judgment for *the commissions prescribed by these rules.* So, too, in many other cases herein cited, the latest being Hansen v. Boyd, 161 U. S., 397. In Nelson v. Board of Trade, 58 Ill. App., 399, 412, the right of this body to prescribe regulations concerning warehouse receipts to be recognized by its members, being the same in principle as the admission of securities by Stock Exchanges, was recognized.

The Enforcement of Rules Requiring Honorable Conduct.

It is noteworthy, in these days of carping doubt as to the good faith of the purposes of parties as declared by themselves, in the way of preamble or otherwise, that the most bitterly contested cases involving these rules arose out of suspensions or expulsions for dishonorable conduct, *without regard to whether the party injured was a member of the body or not.*

The preamble of the Chicago Board of Trade is set out in the Sutherland case, 6 Biss., 526, and was substantially adopted by the defendant Exchange. In a series of cases the lawfulness of the organization was not only assumed, but effect was given to the discipline it visited upon members guilty of dishonorable conduct, such as keeping accounts so as to defraud clients, and failing to perform business engagements.

People v. Board of Trade, 45 Ill., 112, 115, 116;
Fisher v. Board of Trade, 80 Ill., 85;
Baxter v. Board of Trade, 83 Ill., 146;
Sturges v. Board of Trade, 86 Ill., 441;
Pitcher v. Board of Trade, 121 Ill., 412, 419, 420.

It was of this organization that a learned Federal judge declared, after an exhaustive examination, that it "unkertakes to exercise a salutary control over its members" and that its members were "a fraternity of *commercial gentlemen*" by whom irregular or disreputable

dealers were justly treated as are "*shysters*" in the legal profession.

Clarke v. Foss, 7 Biss., 540, 555.

This conclusion was fully affirmed by Judge DRUMMOND in an unreported opinion, noticed in Ward v. Vosburgh, 31 Fed. Rep., 12, 15.

In the most recent Illinois case on the subject, 1896, a leading member of the Board, whose name is given as one of its charter members, (Clapp, 303), was expelled for failing to perform a contract he had made as an officer of another corporation, under the rule authorizing such punishment for an act of bad faith or dishonorable conduct. The court upheld the expulsion, saying: "The right to pursue a business as a member of such an organization in the hall of the building devoted to that purpose may be a thing of value; but its value *is incidental to membership*, and a determination of such membership *destroys the rights under it.* This corporation is not bound to admit any person to membership, nor was the relator in any way forced into such association. He voluntarily became a member, and by his contract *is bound to abide by the rules and regulations of the Board.* The courts will never interfere to control the enforcement of by-laws of such associations; but they will be left to enforce their rules and regulations by such means as they may adopt for their government."

Board of Trade v. Nelson, 162 Ill., 431, 438.

This determination to compel members to be honorable in their dealings has not been confined to the Chicago Board of Trade (Hurst v. Produce Exchange, 100 N. Y., 605). It is shown in the present case that the defendant Exchange has disciplined more members *for improper dealings and for attempts to gain a wrongful advantage over clients*, than for all other causes combined (Record, 179). In People v. New York Commercial Association, 18 Abb. Pr., 271, a member had been expelled for improper practices in trading. He denied the

right of the Exchange to "bind its members to a standard of morality in their dealings with *strangers*"; but the court said that one of the objects of the association being "to inculcate just and equitable principles in trade," and the relator having agreed to the rules of the organization by becoming a member thereof, he stood bound to use honesty and fair dealing in all his trade relations, whether with members or strangers, and that "*it was not an individual matter for a member to violate this agreement, but affected the standing and character of the entire association.*" (279, 280.)

This case has been recently directly affirmed by the New York Court of Appeals in two cases involving a similar question, under the rules of the New York Produce Exchange, the preamble to which is the same as that of this defendant, (see 3 N. E. Rep., 42, 45, 48), and the body of which is substantially the same as that of the Chicago Board of Trade.

People v. Produce Exchange, 149 N. Y., 401;
Ex parte Haebler, 149 N. Y., 414, 425, 428.

The Milwaukee Chamber of Commerce enforced a rule requiring members to keep their engagements "*whether legally binding on them or not*," and its action was approved as being " in line with the purposes of such Exchange to inculcate just and equitable principles in trade."

Dickenson v. Chamber of Commerce, 29 Wis., 45, 50, 50, 51.

The validity of a transaction carried on under the rules of the New Orleans Cotton Exchange coming up, the Supreme Court of Louisiana said of that body: "Amongst its principles as declared in its charter are the following: To establish just and equitable principles, *uniform usages*, rules, and regulations, and standards for classification, which shall govern all transactions connected with the cotton trade, * * * and generally *to promote the interests of the trade, and to*

increase the facilities and the amount of the cotton business of the City of New Orleans."

The suit was to recover *commisions prescribed by the rules of the Exchange*, and also commissions which the plaintiffs had paid out as brokers on behalf of the defendant. The controversy was decided in accordance with the rules of the Exchange, and it was said, answering the suggestion that the rules were intended as an evasion of the law on the subject of illegal contracts, that "the law presumes that the true intent of parties is that which is expressed upon the face of their contracts, and also that men in their business transactions do not intend to violate the law, or to make contracts for the enforcement of which the law refuses a remedy."

Conner v. Robertson, 37 La. An., 814, 818.

PRODUCE EXCHANGES IN OTHER AMERICAN CITIES.

1. The NEW YORK PRODUCE EXCHANGE originated in 1862. Its building cost nearly $3,200,000. Membership is limited to 3,000 and the initiation fee is $10,000. (Clapp, 293.) "The *inspection of grain* in the City of New York is under the control of this Exchange." (Clapp, 295.)

2. The ST. LOUIS MERCHANTS' EXCHANGE was organized in 1862 and is the outgrowth of a body formed in 1836. A building costing $1,800,000 is occupied by it. It has 3,000 members and the initiation fee is $2,500. The inspection of grain in East St. Louis, where most of the elevators are located, is under the control of the Exchange. (Clapp, 337.)

Its rules are substantially the same as those which prevail at Chicago. They provide, among other things, *a schedule of minimum commissions* (Rule IV., Section 12), a circumstance which came under the notice of Judge THOMPSON, in December, 1892, nearly four years after the Missouri Anti-Trust Statute had been enact-

ed, (2 Rev. Stat., 1889, p. 1702), without evoking the slightest criticism.

Warren v. Merchants' Exchange, 52 Mo. App., 157, 167.

So, too, the fact, noted in another case, that "its transactions embrace *nearly all business* in certain lines, especially breadstuffs and provisions."

Eliot v. Merchants' Exchange, 14 Mo. App., 234, 237.

In Goddard v. Merchants' Exchange, 9 Mo. App., 290, it was found that the body had been formed for the purpose of *facilitating business transactions*, and the preamble to the rules is set forth at length (292). It was held that a rule requiring the buyer to pay certain storage charges on grain sold in bulk and represented by elevator receipts, was valid and that, as between members, it had the force of a contract or of positive law and not merely of a custom. (295). That *uniformity was attained thereby conclusively proved it to be reasonable* and not open to objection on the score of public policy. (296).

It was also said that "*nearly all the grain* sold in the St. Louis market *is sold on the floor of the Exchange.*" (292.) Affirmed, 78 Mo., 609.

In Albers v. Merchants Exchange, 39 Mo. App., 583, 590, it was found "that the privilege of meeting other merchants on the floor of the Exchange to trade with them (all but members being rigorously excluded) is a very valuable privilege."

In a case growing out of the previous one, the Supreme Court of Missouri also confirmed the good faith of the preamble to the rules and gave effect to the proposition that "the Exchange is not a corporation organized *for pecuniary profit.* It has no capital stock and pays no dividends."

Albers v. Merchants' Exchange, 39 S. W. Rep., 473, 478 (1897).

3. The KANSAS CITY BOARD OF TRADE was organ-

ized in 1868; it has 200 members, and occupies a building which cost $662,500. (Clapp, 325.) The initiation fee is $1,000. Its rules are substantially the same as those which prevail at Chicago and St. Louis. Among them is a provision to protect its officers against suits (Revised Rules, 1895, p. 50), and *a schedule of minimum commissions.* (p. 56).

The right of this body to appoint inspectors of grain, and the status of owners of private grain warehouses at Kansas City, were the subjects of an elaborate opinion delivered by the Missouri Supreme Court in 1893. The facts of that case disclosed that "said city was one of the chief grain markets of the world; * * * there are shipped daily to said city, and there *sold and bought* and *shipped* from said city, by citizens of this and *other States*,* * large quantities of grain, amounting annually to many millions of bushels (183); * * the evidence tended to show that at least *ninety-five per cent.* of the grain came from *Kansas* and *Nebraska.* * * It found a market in the *Eastern States* and in *Europe*," (190), and the inspection provided, it was said, was intended to and did "*facilitate trade*," (194).

State *ex rel.* Attorney-General v. Smith, 114 Mo., 180.

Similar Exchanges exist practically in every city of importance in the land:

4. In BOSTON, since 1836, with a building costing $500,000; a membership of about 975, worth $350 each; and having charge of the inspection of grain. (Clapp, 315.)

5. In PHILADELPHIA, since 1854, with 490 members, an initiation fee of $1,000, and in charge of the inspection of grain. (Clapp, 333.)

The Philadelphia Corn Exchange was incorporated by a special charter granted January 22, 1861, in the preamble to which the Legislature of Pennsylvania solemnly recited that the objects of the organization "are for *the advancement of the trade and for the improve-*

ment of the facilities for transacting business,"—language hardly apt to describe a combination or conspiracy in *restraint* of trade.

And as recently as January 29, 1896, the retiring president, one of the leading merchants of Philadelphia, *publicly* used language which, if, indeed, he was addressing an association of fellow-criminals, was certainly highly extraordinary:

"The Commercial Exchange has long been *the foremost of the active business organizations of Philadelphia*. It represents in a larger degree than any other of the Trade Exchanges, the wealth and influence of the business of Philadelphia. It is the center of the grain and flour interests of the city and State, and *the success of the branches of business which are its chief concern means the development of the commerce of the port*, which brings Philadelphia into prominence as a factor in *the international trade* of the country, which feeds the traffic of its railroads, and contributes business to its insurance, banking and manufacturing interests.

"The Commercial Exchange has always been *in the van of progressive work for the development of the material interests of Philadelphia* and its influence will always be felt in *that direction*." (42nd Annual Report, Philadelphia Commercial Exchange, 1896, pp. 42, 43.)

If the theory of the complainant in the present case be correct, the conduct of that speaker was nothing short of *brazen effrontery!* For a perusal of the by-laws and rules of that body (set out in the same pamphlet, pp. 99-154), discloses that that organization is subject to all the charges of illegality asserted against the present Exchange. It has a similar preamble; *none but members are entitled to the privileges thereof* (Art. II., XII.); members may be disciplined, suspended or expelled (Art. XXV.); compulsory arbitration of business disputes is prescribed (Art. XVI.), under sanction of an express legislative enactment (see

Act approved April 21, 1870, on page 97 of pamphlet); on non-payment of assessments, members stand suspended (Art. XVII.); *a bulletin is provided for posting* (Art. XX.), on which the names of *suspended or expelled members* are published (Floor Rule VIII., p. 154); the inspection and warehousing of grain is regulated (Rules I. to XIV.); the manner of dealing is prescribed in detail (Rules V. to XVI.); storage charges and *minimum commissions* are fixed by the directors, (p. 150), under the power conferred by Article XXIII.; and visitors are prohibited from transacting business (Floor Rule V., p. 153).

And yet this body "has always been *in the van of progressive work for the development of the material interests of Philadelphia*, and its influence will always be felt in *that direction!*"

The validity of these rules has been declared to be free from doubt.

> Sexton v. Commercial Exchange, 10 Pa. Co. Ct., 607, 610.

This organization was one of the parties complainant, (as were others of a similar character located elsewhere), in the important case of Texas & Pac. Ry. v. Interstate Commerce Commission, 162 U. S., 197, 200, decided as recently as 1896. The Court noticed that these organizations were composed of merchants and traders engaged in business "as *active competitors*" with merchants in other trade-centers (at 215). Mr. Justice HARLAN, speaking for the dissenting minority, likewise referred to their presence in the case, (at 241), and, referring of the argument that *no one but such bodies* had complained of the discrimination in railroad rates then under consideration, said: "But, I may ask whether *the interests represented by these Boards of Trade and Commercial Exchanges are not entitled to consideration?*" (at 252). The railway companies were represented by counsel of national reputation, (203), and if it had been thought that such organizations

were not entitled to appear as complainants *in equity*, *i. e.*, that they were not free *from any taint of illegality*, is it not reasonable to suppose that this would have been included among the points of objection urged against their right to be heard in that case? And if the rules are as to conspiracies laid down in his dissenting opinion in United States v. E. C. Knight Co., 156 U. S., 1, 24–30, and in Arthur v. Oakes, 63 Fed. Rep., 310, had the slightest application to such bodies, would Mr. Justice HARLAN have characterized them as entitled to such high consideration? Would he not have declared them to be *illegal conspiracies with not even the right to exist?*

6. The BALTIMORE CORN AND FLOUR EXCHANGE was organized in 1853; occupies and owns a large interest in a building costing $600,000; has about 550 members; the initiation fee is $250; and it controls the inspection of grain at that city. (Clapp, 313.)

Its rules are, in essential particulars, the same as those of the Chicago Board of Trade. The provisions governing *commissions* are embodied in Article XXV., on page 70 of its Annual Report of 1895.

In Irwin v. Williar, 110 U. S., 499, 501, it was stated that "by and through the members of this Exchange, *substantially all* the business of buying and selling grain at that city was done." (501.)

7. The BUFFALO MERCHANTS' EXCHANGE originated in 1844; has 478 members; and controls the inspection of grain. (Clapp, 317.)

8. The DETROIT BOARD OF TRADE was organized in 1856; has 125 members; and controls the inspection of grain. (Clapp, 321.) Its preamble and rules are practically copies of those prevailing at Chicago, including *the schedule of minimum commissions.* (Revised Rules, 1886, pp. 5–40.)

9. In the annual report of the CLEVELAND CHAMBER OF COMMERCE for 1896, it was stated that a Produce Exchange was in process of

organization and the members of the Chamber concurred that "it is confidently believed that such a board would *promote the extension of Cleveland's grain trade* and that by the application of strict rules of government, individual interests would be greatly benefited" (p. 87), a sentiment indicating a woeful ignorance of the fact that such Exchange, if formed, would subject the promoters to the charge of a criminal offense.

10. The CINCINNATI CHAMBER OF COMMERCE AND MERCHANT'S EXCHANGE was organized in 1839 by 42 persons and now has a membership of nearly 2,000. It owns a building costing $775,000 and controls the inspection of grain and cotton at that market. (Clapp, 319.) That body has also expelled a member for dishonorable business conduct towards a non-member, and its action was sustained on the ground that it had the right to supervise the morals of its members in all mercadtile transactions.

Blumenthal v. Chamber of Commerce, 7 Cin. L. B., 327.

According to the annual report for 1895, its property is now worth over $1,000,000.

11. The TOLEDO PRODUCE EXCHANGE originated in 1849; owns a building costing $150,000; its membership is limited to 100 and the initiation fee is $250. It controls the inspection of grain in that city. (Clapp, 339.)

12. The MILWAUKEE CHAMBER OF COMMERCE was organized in 1858; has about 600 members, whose initiation fee was $500 in 1894 (Clapp, 327), but is now $1,000. (Annual Report, 1896, Rule XII.) The *rates of commission* are precisely the same as those which prevail at Chicago. (Annual Report, 1896, p. 186.) Its preamble is in the same form as that of this defendant. (Annual Report, 1896, Appendix p. vii.) Its members are prohibited from gathering at any place in and about the building for trading purposes, and

allowed to trade *only between given hours.* (Rule XI., section 9.) No person under sentence of suspension or expulsion *by any other similar commercial body* is eligible to membership. (Rule XII., section 5.)

A rule requiring members to perform their engagements, *whether legally binding or not*, has been sustained, the court saying that such a rule "is a perfectly reasonable and proper one and is well calculated *to promote the objects* which such organizations are created to accomplish."

Dickenson v. Chamber of Commerce, 29 Wis., 45, 50, 51.

Referring to this and similar rulings, it is said that, "this broad power would seem essential to the very nature of an organization, having among its objects the enforcement of honorable business principles among its members, together with the furtherance of a high standard of commercial honor and commercial credit in the *community at large.*"

Bisbee & S. Produce Exch., p. 19.

Rule XI., section 9, which prohibits trading at places in the vicinity of the Exchange, was attacked as being *in restraint of trade*, but the court upheld it upon the ground that the practice prohibited may have "tended to promote *irregular transactions by persons not members of the Chamber and amenable to its rules.*"

State v. Milwaukee Chamber of Commerce, 47 Wis., 670, 683.

As the law on the subject of contracts in restraint of trade was thus directly brought to the notice of the court, it is important to note that it was said, after referring to the rules of the organization: "*These are lawful objects.*" (47 Wis., at 685.)

In a Massachusetts case, the preamble to the act incorporating the Milwaukee Chamber of Commerce came under notice. It was recited that one of its objects was "to establish and maintain *uniformity in the commercial usages* of the city," and the court adverted to

"the fact that this body of merchants has passed general regulations upon the subject" under consideration as persuasive evidence that a uniform usage to the same effect existed in that city.

Kershaw v. Wright, 115 Mass., 361, 365.

13. THE SAN FRANCISCO PRODUCE EXCHANGE was organized in 1867. (Clapp, 335.) One of its memberships has realized $1,100 at forced judicial sale and its rules have been said to be "essentially the same as those of other Produce Exchanges."

Habenicht v. Lissak, 78 Cal., 351, 352.

The latter statement was repeated as recently as June, 1897, accompanied by a reference to Bisbee & Simonds on Produce Exchanges for a particular description of these bodies.

Meherin v. San Francisco Produce Exchange, 117 Cali., 215.

14. The PEORIA BOARD OF TRADE was organized in 1850; has 105 members; and the initiation fee is $500. It was incorporated under an Act approved February 8, 1849, section 2 of which specifically provides that "said corporation shall have the right to admit as member *such persons as they may see fit*, and expel any member as they see fit." (Revised Rules, 1888, p. 3.) The rules on the subject of *commissions* are copies of those of the Chicago Board of Trade on the same subject. (Rule XVI., p. 34.)

15. The MINNEAPOLIS CHAMBER OF COMMERCE was organized in 1881; its membership is limited to 550, 538 of which had been taken in 1894; the initiation fee is $1,000; and it owns a building costing $200,000. (Clapp., 329.)

16. The DULUTH BOARD OF TRADE was likewise organized in 1881; has a membership of 185; the initiation fee is $500; and its building cost $310,000.

17. The NEW YORK COFFEE EXCHANGE was organized in 1882; has 312 members; the initiation fee is $1,000; and it owns a building now worth $600,000.

(Secretary's letter prefixed to By-Laws and Rules, 1894.) It needs but a casual glance at the contents of this volume (admirably indexed), to demonstrate that that body is also subject to all the charges of the present bill. The rules cover: Membership, pp. 17-20; discipline of members, pp. 26-27; posting for non-payment of fines, pp. 33, 34; members cannot form a partnership with a suspended, expelled, or insolvent member, pp. 27, 38; *posting of suspended and expelled members*, p. 43; all interest of expelled members in the property of the Exchange reverts to that body, Section 75, pp. 43, 44; any member *seeking an injunction* or other remedy to interfere with the discharge of any of the duties imposed upon the officers and committee "shall, *by that act*, *cease to be a member*," p. 48; *the minimum commissions*, *to* "*be charged and paid under all circumstances*," are prescribed, pp. 60-62; dealings are limited to the interval between prescribed hours, p. 64; *visitors are prohibited from transacting business*, p. 66; and every member *must have his office within half a mile of the Exchange Building*, p. 67. The provisions for trading, inspection, grading and arbitration are on pp. 69-103.

18. The rules of the DENVER CHAMBER OF COMMERCE, as to the conditions upon which membership therein is held, have recently been sustained.

Denver Chamber of Commerce v. Green, 47 Pac. Rep., 140 (Colo., 1896.)

19. From the tabulations made by the Interstate Commerce Commission, September, 1894, official document, part of which is reproduced in Clapp (342), and by the Chief of the Bureau of Statistics of the Treasury Department, June 15, 1889, it appears that Exchanges of a similar nature, having a then membership as stated, are located at the following cities, among others:

Mobile Board of Trade.....248 members.
Atlanta Chamber of Commerce..200 "

Indianapolis Board of Trade.....496 "
Louisville Board of Trade.....682 "
New Orleans Sugar Exchange...197 "
Boston Fruit & Produce Exch...252 "
St. Paul Chamber of Commerce.496 "
Philadelphia Petroleum Exch....223 "
Richmond Grain & Cotton Exch 104 "
Richmond Tobacco Exchange....176 "

20. In Vaughn v. Herndon, 91 Tenn., 64, the rules of the Clarksville Tobacco Board of Trade were upheld; and speaking of a provision requiring members to arbitrate their differences according to the method provided by the rules, the court said that these provisions "are wise legislation and will operate to prevent much needless and extensive litigation as well as *promote the welfare of commerce* if correctly enforced." (68, 69.)

THERE EXIST ALSO A LARGE NUMBER OF COTTON EXCHANGES:

1. The NEW YORK COTTON EXCHANGE was organized in 1870; has 454 members; the initiation fee is $10,000; and it owns a building costing over $1,000,000 (Clapp, 267).

CHARTER AND RULES OF NEW YORK COTTON EXCHANGE.

The charter, rules and regulations, adjudged by this Court, in 1893, "to show that this Cotton Exchange was *a lawful body, organized for lawful business purposes*," (Bibb v. Allen, 149 U. S., at 489), embody the following provisions:

The special charter of the corporation discloses its purposes to be, among others, "to provide, regulate and maintain a suitable building for a Cotton Exchange; to adjust controversies between its members; to establish

just and equitable principles in the trade; *to maintain uniformity in its rules, regulations and usages;* * * and generally *to promote the cotton trade* of the city of New York, *increase its amount*, and *augment the facilities by which it may be conducted.*" (Laws, N. Y., 1871, Ch. 365, Sec. 3.) Upon all awards made by its Arbitration Committee, a judgment of the Supreme Court may be entered, and such awards shall be unimpeachable, except for fraud (Ib., Sec. 7). By Chapter 228, Laws, N. Y., 1880, the corporation was authorized to establish a Gratuity Fund for the benefit of families of deceased members. Other amendments were made in 1881 (Chapter 113) and in 1883 (Chapter 59).

In the By-Laws and Rules (14 Ed., 1894), provisions concerning the following matters are found:

The qualification and election of members, each of whom is required to pledge himself to respect and abide by the then existing or subsequently adopted regulations (Secs. 1–3, pp. 9, 10).

"A certificate of membership may be transferred to a member or member-elect, *but to no other person*" (Sec. 5, p. 10).

In Allen v. Cotton Exchange, digested in Dos Passos, Stock Exchanges 91, 92, the court refused to compel the organization to recognize the purchaser of one of its memberships, without having himself been first duly admitted: "It is very evident that *the whole design of the organization* would be thwarted by introducing into the Exchange purchasers at a judicial sale, without a compliance *with the requisite rules of admission and against the wishes of the regular members.*" (See, also, Campbell v. Cotton Exchange, Dos Passos, 95, 96.)

On failure to pay an assessment or a fine within a given time, a member is "*posted*" *and deprived of the privileges of membership* (Secs. 8, 9, pp. 11, 12).

When a member shall find himself *insolvent*, or

shall fail to *comply with a contract*, his name is likewise *posted* and the privileges of his *membership suspended* (Secs. 10–18; pp. 13–19). His membership is subject to sale *for the benefit of his Exchange creditors* (Sec. 16, p. 18), to a member or member-elect at public vendue in the Exchange Rooms (Sec. 28, p. 24), provisions which this Court has declared to be valid (Hyde v. Woods, 94 U. S., 523).

All controversies growing out of Exchange dealings *must* be arbitrated on the request of *either party* (Secs. 19–27, pp. 19–24).

Members may be suspended or expelled, *a*, for wilful violation of any rule; *b*, for refusing to submit to arbitration or to abide by an award; *c*, for buying or selling for a clerk or employee of a fellow member without the latter's written consent; and, *d*, for any other misconduct in his relations to the Exchange or its members, or for any disreputable or fraudulent transaction *with a non-member* (Sec. 29, p. 25). The trial of charges, and the disposition of a membership in case of expulsion, are covered by sections 30 to 34, pp. 25–28.

The officers and standing committees, and their respective duties, form the subjects of sections 35 to 59, pp. 31–46.

The Committee of Trade (*not Restraint of Trade*) is charged with the duty of reporting "such rules and regulations, etc., as will, in their opinion, *best promote the interests of all persons interested in the cotton trade of the city of New York*" (Sec. 53, p. 39).

"All persons engaged in handling cotton or print cloths for members of this Exchange, (including, among others, warehousemen, inspectors, weighmasters, samplers, and carriers), *must be licensed by the Board of Managers*" (Sec. 60, p. 46), and no action taken by any such persons not thus licensed, is permitted to be recognized under the subsequent trading regulations.

Trading is prohibited *except between given hours*, and contracts, whether made on the Exchange or else-

where, at other hours, *are not binding* (Sec. 65, p. 51).

Non-residents may be admitted as visitors, but *are not permitted to transact any business* while visiting (Sec. 66, p. 52), thus confining business access strictly to members in good standing.

Contracts for future delivery are only permitted to be made *between members* (Sec. 73, p. 61).

Inspection, classification, weighing, sampling, warehouseing, packing, grading, dockage, and delivery, are regulated in great detail (Sec. 74–88; pp. 62–75).

The *charges and fees for these various services* are fixed by section 84, pp. 71, 72.

Cotton shall only be inspected, or be receivable and deliverable within *a certain limited district* of the city and from and at such warehouses as may be *duly licensed.* (Sec. 89, p. 75.)

All *contracts must be signed "by members of the Exchange having permanent offices in the city of New York and within * * half a mile of the Exchange building"* (Secs. 103, 108, pp. 81, 82, 84).

The matter of *minimum commissions* is fully regulated by section 109, p. 84. They are required to "be charged and paid *under all circumstances;*" and the schedule involves the following "discriminations:"

When the transaction is for a *non-member*, 12½ cents a bale;

When for *a member who does not have a permanent office within one-half mile of the Exchange*, 7½ cents per bale;

When for *a member having such office*, 2½ cents per bale;

When for such member *acting on behalf of a named principal*, 1 cent per bale.

On all joint account transactions with non-members, and on all individual business of a non-member partner, the *full commission* of 12½ cents per bale must be charged.

The trade in Print Cloths is likewise fully regu-

lated (Secs. 122-129, pp. 97-101), including *a schedule of minimum commissions* (Sec. 128, p. 100).

As will be observed this schedule also "discriminates" between the rates to be charged to non-members and to members, respectively, and between the rates to be paid by members when dealing as *principals* and when acting as *brokers* for others.

Rules 2 and 4 forbid *wagering contracts* (pp. 104, 105), and *betting* of any kind whatsoever is prohibited by Rule 26 *a* (p. 126).

Margins, closing, clearing, settlements, quotations, and deliveries, are fully regulated, both as to cotton (pp. 102-117), and as to print cloths (pp. 126-138).

It will be observed that this is an excellent type of the regular Commercial Exchange, as developed by American ability and experience, and as most admirably adapted to facilitate the orderly and honorable conduct of an important branch of our commerce, under usages codified so as to insure uniformity, certainty, and the protection of every interest concerned.

Kingsbury v. Kirwin, 9 Jones & S., 451, 454; affirmed, 77 N. Y., 612;

Lehman v. Strassberger, 2 Woods, 554, 556, 562.

As such, it merited the approving sanction which it received at the hands of this Court; and yet, no objection has been urged in this case which, if sustained, will not be *equally applicable to that organization.*

Memberships in this body were endorsed as *lawful* property but declared to be subject to the rule against transfers to a non-member in two well-considered cases.

Ritterband v. Baggett, 4 Abb. N. C., 67, 68, 71;

Powell v. Waldron, 97 N. Y., 328, 331.

These rules, as above summarized, embody a valid contract binding on all members.

Baum v. Cotton Exchange, 21 Abb. N. C., 253.

2. The NEW ORLEANS COTTON EXCHANGE was organized in 1870; and owns a building costing $450,

000. It has 377 members, who are required to own at least one share of stock worth $1,000. (Clapp, 281.)

The Supreme Court of Louisiana has said of this organization: "Its membership comprises the *leading merchants* engaged in all the ramifications of *the vast cotton trade of the city*. It conducts its business in the most splendid building of the metropolis, situated on one of its most important public thoroughfares."

Conner v. Robertson, 37 La. An., 814, 815.

In a suit by members of this Exchange for services rendered "under the rules and regulations prescribed by that institutiou, to be compensated by the *commissions thereby allowed*," it was held that parties dealing with members of such an Exchange did so with presumed knowledge of and subject to its rules and regulations, and a *recovery was adjudged accordingly*.

Lehman v. Feld, 37 Fed. Rep., 852.

3. There are also Cotton Exchanges at the following points:

Charleston,	Clapp,	287.	Galveston,	Clapp,	287.
Savannah,	"	289.	Houston,	"	287.
Augusta, Ga.,	"	285.	Vicksburg,	"	342.
Memphis,	"	286.	Natchez,	"	342.
Mobile,	"	287.	St. Louis,	"	342.
Norfolk,	"	289.			

4. The MEMPHIS COTTON EXCHANGE was organized in 1873; its present membership is 165, and is limited to 175; initiation fee $500. The provisions as to membership and the manner of trading are similar to those of Produce Exchanges.

A table of minimum commissions is prescribed, which governs members in all cases "and shall be *absolutely net and free of any rebate, telegraphic charge, and discount in any way, shape or manner*." The giving of *a bonus or sharing of commissions* is forbidden. Any violation of the rule, or attempt to evade the same, is punishable by a fine of $1,000, and by expulsion for the second offense. (Annual Report, 1889, p. 50.)

Miscellaneous Exchanges.

1. The Providence Board of Trade was incorporated by special charter granted in May, 1868, "for the purpose *of promoting trade and commerce* in the City of Providence and its vicinity." By a subsequent act, (January, 1880), it was given "power to expel or suspend any member for such cause or causes as said Board of Trade may by its by-laws specify." (Manual Providence Board of Trade, 1897, pp. 9, 11.) As the body is not composed of commission merchants, its rules do not prescribe a schedule of commissions. But its members are largely interested in the business of buying and selling cotton (for use in the mills of Rhode Island and elsewhere in New England), and this "interstate" trade is regulated with great care and in such a way as to subject the associates to the contention of this complainant.

The By-Laws regulate the admission of members; no person shall be allowed the privilege of membership until he has been elected and qualified; and membership *is limited to 600.* (Art. I.)

On failing to pay an assessment, a member is stricken from the rolls and *his name posted on the bulletin board.* (Art. V.)

Committees on Arbitration and Appeal are provided. (Art. VI.)

No persons engaged in business *are admitted to the rooms of the Board* unless they are members. (Art. VII.)

Members are subject to suspension or expulsion for violating the rules; for ungentlemanly or dishonorable conduct in the board's rooms; and for being guilty of a fraudulent business transaction, whether with a member or non-member; and on conviction of a crime. (Art. VIII.)

It is interesting to note the careful provisions for the inspection, weighing and "dockage" of cotton,

(Rules 4, 5, 6, 7, 8, 9, 12, 15, Manual, pp. 29, 31), which proceed upon precisely the same lines embodied in the regulations adopted by the defendant Exchange for the "dockage" of hogs.

In the "Historical Review" contained in this publication, these "conspirators" have the audacity to say: "This body was organized in the year 1868, 'for the purpose of *promoting trade and commerce* in the city of Providence and vicinity,' according to the words of the charter. The *most influential and active merchants and manufacturers* then engaged in our city and its neighboring districts, were included among the members. The majority of the founders have passed on and their earthly labors have ceased, but *the excellent influence of their active career* remains—an inheritance for the whole community. All important enterprises tending to the industrial and commercial development of our city have been *encouraged and directly promoted* by the *efficient* action of this Commercial Exchange. The *steadfast and conserving authority* of the institution has been felt in the quiet course of the market, even when that authority has not been put forth in positive action. Its rules of business have been so well adjusted to the customs and conditions of the community that very little difference or dispute has called for action on the part of its tribunals and arbitrators. * * * In June, (1868), a resolution was adopted, seeking the sale of cotton by actual weight, and the establishment of legal tare. This began a long series of inspection digest and legislation, *to regulate the Providence market for cotton, that great factor in our industries.* The present season witnessed a careful revision and a new manual embodying the changed conditions of the market. * * *

"In all these years the Board has interested itself in the movement of legislation and the agitation of public matters affecting our city and State. We can only mention a few of the measures, to which our predecessors have given their attention. In Bankrupt

laws, from the first Jenckes Act to the pending Torrey Bill, the Board has manifested *a lively and almost constant interest.* Senator Ingalls especially commended our *prompt and judicious action.* * * * A line of measures more nearly affecting Rhode Island is to be found in the great internal improvements. Herein we are *always communicating with our Senators and Representatives in Congress.* * * * The officers of the Board have given much attention to the growing *exports* of manufactures, and it would appear that our community must ultimately *find profitable business* in that direction." (Manual, 12–15.)

A glance at the list of the members of this organization will disclose whether it is true that the most prominent and influential citizens of Rhode Island are concerned in this effort to *restrain trade* and to *injure the public welfare.* That list includes Judge LeBaron B. Colt, (33); Senator Nelson W. Aldrich, (32); State Supreme Court Judge Horatio Rogers, (36); and Hon. D. Russell Brown, Governor 1892–96, (32).

2. It is worthy in this connection, to note the important organization known as the NEW YORK REAL ESTATE EXCHANGE. This was formed in 1883, it being found, from the long experience, "that there must be some system whereby real estate affairs should be managed *with the respectability and safety proper to all legitimate transactions.*" This desirable result was attained by the organization of an Exchange "with its comparative *uniformity of methods, consolidation of interests, command of public confidence*, and diffusive beneficence." Nearly $600,000 were expended in acquiring and equipping a suitable building. Five hundred members were enrolled, each of whom were required to own at least $1,000 in stock of the corporation. Membership is at the pleasure of the board of directors and includes some of the most prominent citizens of New York. "They control lands and buildings in that city estimated at $800,000,000."

It has been pointed out that in dealings valued at over $400,000,000 during the first three years of its existence, "not a single complaint against broker or auctioneer has been lodged."

The dealings are not confined to realty situate in New York, but include property *in every state in the Union*, transactions which this complainant would designate to be interstate commerce. There are 22 desks which are rented to auctioneers, and 1888 the sale of the first choice netted $1,600. Members of the Exchange *alone can compete for them. A detailed tariff of commissions for auctioneers and brokers* is provided and required to be observed, $25 being the minimum charge allowed.

The various State courts have each entered an order that all foreclosure and other judicial sales of realty shall be made *at the rooms of the Exchange*, thus affirmatively recognizing the legality of its existence and rules. More than that, *the commissions fixed by those rules actually include those charged for making such judicial sales.* The schedule also covers auctioneer's fees on sales of stock and bonds, private sales by brokers, loans, exchanges, leases, the management of estates, and appraisements. The prescribed "commissions may not *be divided or lessened without liability to discipline.*" (HARPER'S MAGAZINE, November, 1888, pp. 928, 935, Vol. 77.)

These facts came under judicial review, in a case involving the assignability, from one member to another, of an auctioneer's seat. It was held that none but members could compete for such a seat and when once acquired the right was essentially personal, and non-transferable even to a fellow-member.

McQuillen v. Real Estate Exchange, 39 N. Y. St. Rep., 426; 15 N. Y. Supp., 206.

3. The corporate name of the KANSAS CITY REAL ESTATE EXCHANGE was protected against assumption by another as a property right, in analogy to the rules governing common law trade marks.

State *ex rel.* v. Secretary of State, 92 Mo., 355.

4. The NEW YORK CONSOLIDATED STOCK AND PETROLEUM EXCHANGE also deserves notice. It resulted from an amalgamation of several mining, petroleum, and other Exchanges. It has 2,050 members; membership is valued at $125; and it owns a building costing $420,000. (Clapp, 263.)

A suspension from this exchange was upheld in the well-considered case of

Lewis v. Wilson, 121 N. Y., 284, affirming 50 Hun, 166.

This body through its president, Mr. Wilson, was the plaintiff and recognized as having a standing in a court of equity.

Wilson v. Commercial Telegram Co., 3 N. Y. Supp., 633; 18 N. Y. St. Rep., 178.

As recently as October 5, 1897, a learned court, speaking through CULLEN, J., said of parties who belonged to this body: They "were members of a regular Exchange, and (thereby) held themselves out *as carrying on a legitimate and lawful business.*"

Prout v. Chisholm, 47 N. Y. Supp., 81 N. Y. State Rep., 376, 379.

The constitution and rules of the organization which thus came under judicial scrutiny disclose that its members devote themselves to dealings in petroleum, stocks, bonds, and other securities, agricultural and commercial products, ores, metals and other minerals. The provisions and obligations are substantially the same as those prescribed by the rules of the New York Stock Exchange. (Revision 1894.)

All bonds and securities are required to be approved by committees before they can be dealt in. (Art. VI., Sections 4-8.)

A committee on *commissions* is provided, whose duty it is to investigate all charges of violation of the rules relating to commissions; if they find such charge or charges to be proved, they shall report the fact to the

president, who shall at once suspend the offending member. (Art.VI., Section 7.)

Article XVIII. provides that "*the rates of commissions shall be such as may be fixed from time to time by the Board of Directors. Any member doing business for less than the rate so fixed*" shall be suspended for ninety days for the first offense and be subject to expulsion for the second.

Pursuant to this power, the Board of Directors have prepared *an elaborate schedule of minimum commissions.* (pp. 62–4.)

Notice must be given of all partnerships formed, and none can be formed with a suspended member or an insolvent person. (Art. XII.)

Members may be expelled for fraud, and expelled or suspended for violating the constitution or rules, or for misconduct. (Art. XIII.)

A Gratuity Fund, to provide for the families of deceased members, is provided for (Art. XXII.), the benefits of which accrue only to persons who are members in good standing at the time of their decease.

Legal interference with officers or committees subjects a member to suspension or expulsion. (Art. XXIV.)

No member is permitted to become a member of *a similar organization*, except only the New York Stock Exchange. (Art. XXV.)

Dealings are limited to *an interval between certain prescribed hours* and *to the rooms of the Exchange.* (By-Law 1.)

Dealing with *non-members* during these hours subjects the offender to suspension (p. 55).

A member trading directly or indirectly in any other similar organization in New York City, is subject to suspension or expulsion (pp. 55–6).

Every member is required to have a place of business in the vicinity of the Exchange (p. 56).

Elaborate rules are prescribed to govern the deal-

ings in securities, petroleum and other oils, grain and other products, and metals (pp. 65–138).

5. The powers of the LUMBERMAN'S BOARD OF EXCHANGE (of Minneapolis) were considered in

State v. Lumberman's Exchange, 33 Minn., 471.

6. The most recent organization was thus noticed in the press reports, (*St. Louis Republic*, February 12, 1897):

"New York, Feb. 11.—The first Wool Exchange in the United States, and the fourth or fifth in the world, has been incorporated in this State and will be in operation next week in the fine new Wool Exchange building at West Broadway and Beach street. When trading begins *it is hoped by the members to regain for New York the prestige it once had as the wool center of the United States.* The Exchange is capitalized at $1,000,000. It will have in the neighborhood of 1,000 members, trading members becoming such by the payment of a license fee of $100. A general exchange business in wool will be conducted. Allan McNaughton is the president of the new Exchange. He has been actively engaged in the wool business and is the promoter of the enterprise."

V.

LIVE STOCK EXCHANGES. THEIR HISTORY AND RULES.

It was to be expected, therefore, that Live-Stock Exchanges would also come into being. In a general way, it may be said that there is not an important live-stock market in the United States which has not been established and maintained by an Exchange. Such bodies are located at Chicago, Kansas City, St. Louis, East St. Louis, Omaha, Indianapolis, Buffalo, Sioux City, Cincinnati, and Fort Worth.

From the following cases the methods of doing business at these bodies and by their members, including the items of commissions charged, can be fully gathered:

Irwin v. Thompson, 27 Kas., 643;
Thompson v. Irwin, 42 Mo. App., 403;
Stock Yards Co. v. Mallory, 157 Ill., 554;
Cordell v. Hall, 34 Fed. Rep., 866; 142 U. S., 116;
Union Stock Yards Bank v. Gillespie, 41 Fed. Rep., 231; 137 U. S., 411;
Burke v. Fry, 44 Neb., 223.

1. The CHICAGO LIVE STOCK EXCHANGE was fromed in 1884; has 698 members, and the initiation fee is $1,500. The rules of that body will be found to be in all essential respects the same as those of the Kansas City Exchange; indeed, the most important rules of the latter body are literal transcripts of those of the former.

The rules concerning memberships, *commissions* and *solicitors* are the same. (Rules VIII. and IX.)

The penalties are likewise the same; and so is the provision for paying a reward for proof of a violation in this respect. (Rule IX., sections 8, 10.)

Dealings with other live-stock brokers who are not members are prohibited. (Rule IX., section 15.)

The causes for suspension and expulsion are identical. (Rule IV., sections 7, 8, 14.)

There is an additional rule not found at Kansas City, prohibiting "*the loaning of money for less than the legal rate of interest of Illinois.*" (Rule IX., section 13).

The officers of this Exchange have embraced the leading members of their occupation, including J. E. Greer, who was a member of the committee on appeals in 1893–94 and 1894–95, and F. O. Mills, a member of the same committee in 1892–93, 1895–96 and 1896–97. These are the members of the Kansas City Exchange who are alleged, in the pending bill, to have been disciplined by it, and who were the complainants in Greer v. Stoller, 77 Fed. Rep., 1.

If, as the District Attorney said on the argument below, he had to rely upon the information vouchsafed

by these gentlemen, it is proper to test their good faith in volunteering the same, by inquiring why they did not also cause proceedings to be brought against *the very combination of which they are members and even officers!* Can it be believed that three hundred of the best citizens that Kansas and Missouri can boast of, are to be branded as conspirators against commerce and most of them and their many employees thrown out of employment, and, perchance, impoverished by being denied the right to indulge their chosen occupation *according to the only rules and regulations which have been dictated as feasible by the experience of the commercial world*, merely to the end that the private malice of Greer, Mills & Co. may be gratified?

The rules of the Chicago body gave rise to the much-argued case of American Live Stock Commission Co. v. Chicago Live Stock Exchange, 143 Ill., 210; 36 Am. St. Rep., 385; 18 L. R. A. 190, decided in 1892. The proceeding was by a party engaged in the live-stock commission business to enjoin the defendant from refusing to permit it to have and enjoy the privileges of the Chicago Exchange; to have certain rules *providing minimum rates of commission and prohibiting business intercourse with non-members*, declared to be void; to enjoin any notice to members *not to deal with plaintiff*, and any endeavor *to prevent complainant from carrying on its business* at the Chicago Stock Yards; and for general relief.

The petition set out the organization of the Exchange; the combination of its members *to control the selling of live-stock in the Chicago market;* the consequent *impossibility* to sell or exchange live stock at said market except through the members of the Exchange; that under the course of business there prevailing, no one could sell *except members*, and purchasers *would not buy from others*; the extent of the market, showing it to be *the largest in the world*, was set out; the adoption of *a rule fixing mini-*

mum commissions, which were alleged to be *unjust and unreasonable*; that shippers were, perforce, *compelled to pay them*; that thereby, to a great extent, the price of live stock throughout the United States was fixed; that the members had *combined to coerce persons to pay unreasonable commissions and to prevent stock from being sold until a member was employed for that purpose*; that a great proportion of such stock was bought by four certain parties (packers), so that their refusal to purchase from a given person made it *impossible for* such person to deal in said market; that said four parties were members of the Exchange and under its rules *refused to buy from a non-member*; that the Exchange refused to grant plaintiff the privileges of membership and threatened *to notify its members not to deal with plaintiff*; that amendments to the rules had been adopted *specifically directed at plaintiff*, by reason of its mode of doing business (by which its stockholders in effect, were enabled to have their live stock sold *at less than the prescribed commissions*).

The opinion sets out the purposes of the Exchange as enumerated in the preamble to its articles of association, and defined it to be a body *not itself engaged in business* but merely providing facilities to its members, for carrying on, each for himself, his separate business, according to the prescribed rules.(226.) It was held that the plaintiff was neither a member nor entitled to membership as a matter of right; that the Association had an undoubted right to prescribe who should be eligible to election as a member; and "no one can justly claim to be a member who has not been admitted in the mode thus prescribed." (227-229.) It was conceded that the effect of certain recent amendments to the rules of that Exchange had the effect to *debar plaintiff* from becoming a member, and also that the members of the Exchange *would refuse to buy* any live-stock consigned to plaintiff for sale at the Chicago stock yards. (233.)

It will be observed that the bill in that case differed

from the one in the case at bar in that there is no allegation here that the commissions charged at Kansas City are *unreasonable or excessive.*

And, for self-evident reasons, the element whether the commissions prescribed by Rule IX. of the defendant Exchange are excessive or not cannot be injected into this case by means of affidavits in rebuttal, disclosed for the first time on the hearing. There is no allegation in the bill on the subject. The showing of the defendants is not only that the commissions prescribed are reasonable, and such as prevail throughout the world, but also that from *fifty to seventy per cent.* of the amounts collected from that source by members are paid out for the necessary expenses of their occupation. The showing further demonstrates the absolute need of an Exchange, with a drastic rule on the subject, in order to destroy the vicious and odious practice of discrimination and preferences in the way of secret rebates and the like, which had previously prevailed to the detriment of the market. This consideration is, of itself, a sufficient justification for the rule under review, for it discloses that the smaller shipper—the one who was in greatest need of a uniform schedule—is protected against favoritism to the great cattle companies and the larger shippers of live stock; it promotes uniformity and eliminates a fruitful source of complaint on the part of shippers. So, too, it was held as recently as November, 1896, that members of a Live Stock Exchange were entitled to the protection of such a rule against *the practices of unscrupulous fellow-members.*

Jackson v. South Omaha Live-Stock Exchange, 68 N.W. Rep., 1051, 1053, (Neb.).

A learned judge plainly indicated that "*a subterfuge*" to evade the rules concerning commissions was deserving of animadversion.

Baxter v. Allen, 46 Ill. App., 464.

It is part of the known history of the Act of the Kansas Legislature of 1891 (chapter 158), known as the

Roe Bill, upon which the decision of one of the Courts of Appeals of that State is based, that it was procured, indeed "railroaded" through, by the efforts of the American Live Stock Commission Company, the unsuccessful complainant in the Illinois case.

While that statute can have no bearing here, where the decision must rest on Federal legislation alone, it deserves to be noticed, in view of the great reliance placed upon the utterances in that case, that:

a. The case negatives any feature of interstate commerce on the part of these defendants;

b. The utterances alluded to are at variance with the characterization of such Exchanges to be found in numberless cases and official reports elsewhere, especially in the Federal jurisdiction;

c. They are mere *dicta*, and proceed largely upon the allegations of the plaintiff's bill, which it apparently was not deemed essential, in view of the point at issue, to overwhelm by a full showing; and,

d. The act of the Kansas legislature, which was adopted as the basis of the opinion, is, beyond question, so violative of constitutional guaranties that a Federal court would unhesitatingly stamp it as "no law at all." (Cool. Const. Lim., 6 ed., p. 222). Such arbitrary discriminations are not to be tolerated.

In re Grice, 79 Fed. Rep., 627, 639 *et seq.;*
Gulf etc. Ry. Co. v. Ellis, 165 U. S., 150;
Fraser v. McConway & Torley Co., 82 Fed. Rep., 257.

2. The ST. LOUIS LIVE STOCK EXCHANGE was formed in 1885; has a membership of 128; the initiation fee is $1,250; and its rules are substantially the same as those which prevail at Chicago and Kansas City.

3. The KANSAS CITY LIVE STOCK EXCHANGE was formed in 1887; has about 300 members; and the initiation fee is $2,500. Its rules are but partially set out in the bill. It was of these rules that Judge PHILIPS said (and as that complainants' counsel included the names

of Judge Albert H. Horton and Gardiner Lathrop, Esq., and the Act of July 2, 1890, was adverted to, the statement is entitled to even more than usual weight), that "neither does the complainant complain that the general articles of the association are *contrary to law*, or that the limitation in the articles of agreement and by-laws fixing a *minimun commission* at which any member shall sell live-stock shipped to this market, and prohibiting its members from conducting such business 'on the outside' are *in restraint of trade*, or *tend to create a monopoly*."

Greer v. Stoller, 77 Fed. Rep., 1, 7, citing, among others, the last noted Illinois case, (8).

4. The INDIANAPOLIS LIVE STOCK EXCHANGE was likewise formed in 1887; has 60 members; the initiation fee is $500; and the rules are practically transcripts of those of the Chicago Exchange.

5. The SOUTH OMAHA LIVE STOCK EXCHANGE was formed in 1889, and has rules similar to those of its sister Exchanges. It has 204 members and the initiation fee is $1,000.

It was of this body that a Court not at all friendly to "trusts" (State v. Nebraska Distilling Co., 29 Neb., 700), held that the rule on the subject of *commissions and rebates* properly prohibited "*the payment of money for the purpose of influencing shippers to patronize one live-stock commisssion firm rather than another*," and said that this was a rule *to the protection of which members were entitled*. The injunction was *denied*, with *no word of criticism* upon the legality of the existence of the Exchange or the validity of its rules.

Jackson v. South Omaha Live Stock Exchange, 68 N. W. Rep., 1051, 1053, (Neb., 1896.)

6. The rules of the SIOUX CITY LIVE STOCK EXCHANGE, adopted August 5, 1889, are to the same substantial effect, and contain a prohibition against sending a *prepaid telegraphic or telephonic message* relating to the state of the market. (Rule XIX., Section 7, p. 17.)

7. The EAST BUFFALO LIVE STOCK ASSOCIATION was organized in 1887; has about 100 members; the initiation fee is $500; and the rules are for the most part literal duplicates of those under consideration. (See Revised Rules, 1893.)

8. At CINCINNATI, the live-stock trade is almost exclusively in hogs and is under the control of the Chamber of Commerce. *A table of commissions is prescribed*, the dockage of hogs provided for, and the privileges of the organization limited *to members in good standing*. (Annual Report, 1895, pp. 262, 238, 23.) This is supplemented by an agreement among those engaged in selling live-stock for a commission at the Cincinnati and Covington, (Ky.) yards, whom the complainant would declare to be clearly engaged in interstate commerce, for those parties not only use the telegraph but also the Covington bridge, in transacting their business. (See Rules of Cincinnati Live Stock Commission Merchants, 1889.)

9. The FORT WORTH LIVE STOCK EXCHANGE was formed in 1893, in a State which prides itself on having taken the lead *in antagonizing combinations calculated to injuriously affect the public*. The published rules of that body are in affect the same as those which prevail at Chicago and Kansas City. For provisions on the subject of commissions, rebates, solicitors, etc., see Rule IX., pp. 17–20.

10. The PITTSBURGH LIVE STOCK EXCHANGE was formed in December, 1895, and granted a certificate of incorporation by the Court of Common Pleas of Allegheny county on January 27, 1896. The petition for such certificate declared that "said corporation is formed for the purpose of fostering and protecting the general business interests of all its members, and the regulation of business transactions among the members and with customers" (Manual of said Exchange, 3). The order of the court discloses that the rules of the body were submitted to judicial scrutiny (7), and the judgment was

"THAT SAID PURPOSES ARE LAWFUL AND NOT INJURIOUS TO THE COMMUNITY." (6).

These rules are substantially the same as those of other Live Stock Exchanges, including *a schedule of minimum commissions* (Rule IX., p. 30); a prohibition against rebates except to members of other Exchanges (Sec. 3, p. 32); a regulation of the employment of solicitors (§ 5, p. 32); a provision forbidding the sending of prepaid telegrams unless it be to report actual sales on the same day on behalf of the addressee (Rule XVI., § 6, p. 37); and the personal solicitation of employment within the limits of Allegheny county between certain hours (Rule XIX., p. 38).

Honorable conduct is enforced (Rule IV., pp. 11–18); soliciting employment to sell live stock consigned to another member, or accepting such employment after a reputable fellow-member has offered the property for sale, is declared to be uncommercial conduct (§ 6, p. 29); and delinquencies and defaults on the part of shippers or purchasers are required to be reported and further dealings with them are forbidden (§§ 1–4, pp. 35–37).

Membership may be surrendered or transferred by a member "provided, however, that *he cease to do business* at the Pittsburgh Central Stock Yards," (§ 3, p. 28), and all persons beginning a live-stock commission business at said Yards shall, after twenty days, become subject to said rules, and, failing to do so, members are enjoined not to thereafter deal with such person (§ 5, p. 37).

RECAPITULATION.

NUMBER OF MEMBERS AND VALUE OF MEMBERSHIP AND BUILDINGS.

1. As already stated, the adoption of the contentions of the complainant will not only render all memberships in these bodies entirely valueless, but brand

each of the holders thereof as guilty of a crime under the Act of Congress approved July 2, 1890.

Tabulating the value of such memberships and the number of persons holding the same, so far as the data at hand discloses the needed information, produces the following result:

Name of Exchange.	No. of Members.	Value of Membership.	Aggregate Membership Value.
New York Stock	1,100	$35,000	$38,500,000
Boston Stock	150	12,500	1,875,000
Philadelphia Stock	230	8,000	1,840,000
Chicago Stock	445	1,500	667,500
San Francisco Stock	200	6,000	1,200,000
Chicago Board of Trade	1,900	10,000	19,000,000
New York Produce	3,000	10,000	30,000,000
St. Louis Merchants	3,000	2,500	7,500,000
Boston Board of Trade	975	350	281,000
Philadelphia Commercial	490	1,000	490,000
Baltimore Corn and Flour	550	250	137,500
Buffalo Grain	478	100	47,800
Detroit Board of Trade	125	50	6,250
Toledo Produce	100	250	25,000
Milwaukee Chamber	600	1,000	600,000
Kansas City Board of Trade	200	1,000	200,000
Peoria Board of Trade	105	500	52,500
Minneapolis Chamber	538	1,000	538,000
Duluth Board of Trade	185	500	92,500
New York Coffee	312	1,000	312,000
New Orleans Cotton	377	1,000	377,000
New York Cotton	450	10,000	4,500,000
Memphis Cotton	165	500	82,500
New York Real Estate	500	1,000	500,000
New York Consolidated	2,050	125	256,250
Chicago Live Stock	698	1,500	1,047,000
St. Louis Live Stock	128	1,250	160,000
Kansas City Live Stock	300	2,500	750,000
Indianapolis LiveStock	60	500	30,000
Omaha Live Stock	204	1,000	204,000
Buffalo Live Stock	100	500	50,000
	19,819		$106,362,050

It will be observed, by comparing this table with the various compilations of the names and locations of American Exchanges already cited, that a large number of them have not been included in the result. This is due to the absence of accurate data in reference to those omitted. It is a fair estimate that these would increase the number of members affected to considerably over 22,000, and the aggregate value of Exchange memberships to more than $110,000,000.

2. Many of the important Exchanges occupy leased premises. In this category are the New York, Boston, Chicago, and San Francisco Stock Exchanges. In many other instances, and this includes all Live Stock Exchanges, the premises where business is done belong to entirely distinct and independent stock yards companies. Compiling the value of the buildings owned by the American Exchanges, and in the ownership of which they are largely interested, shows the following result:

Philadelphia Bourse	$ 1,350,000
Chicago Board of Trade	1,850,000
New York Produce	3,200,000
St. Louis Merchants	1,800,000
Boston Board of Trade	500,000
Baltimore Chamber of Commerce	600,000
Cincinnati Chamber of Commerce	1,000,000
Toledo Produce	150,000
Milwaukee Chamber	115,000
Kansas City Board of Trade	662,500
Minneapolis Chamber	200,000
Duluth Board of Trade	310,000
New Orleans Cotton	450,000
New York Cotton	1,000,000
New York Coffee	600,000
New York Real Estate	600,000
New York Consolidated	420,000
Portland (Ore.) Chamber	825,000
Total	$15,632,500

The New York Stock Exchange, however, holds all the stock of the corporation which is the owner of the premises occupied by it.

Dos Passos, Stock Exchanges, 20.

The National Board of Trade.

In the wake of the organization of the Association of Chambers of Commerce of the United Kingdom, the National Board of Trade of the United States was formed in 1868 for these declared purposes:

"In order to promote *the efficiency and extend the usefulness* of the various Boards of Trade, Chambers of Commerce, and other chartered bodies organized for general commercial purposes in the United States; in order to secure *unity and harmony of action in reference to commercial usages, customs and laws;* and, especially, in order to secure the proper consideration of questions pertaining to the *financial, commercial and industrial interests of the country at large.*" (Proceedings, 1896, vii.)

Since 1879, this body has held its annual meetings (except three) in the city of Washington. It appears from the published proceedings, which are stated to be regularly transmitted to Congress, that prominent members of that body have many times been present as participants in the discussions. In 1892, a formal visit was paid to President Harrison, who said, in acknowledgment, among other things: "I have always observed the discussions and conclusions at which they (the delegates from the various Exchanges belonging to the body) have arrived in their annual meetings, *with interest and respect.*" (Proceedings, 1892, p. 225.)

It can hardly be supposed that the very conscientious and learned Chief Executive believed that eighteen months previous he had signed a bill under which the gentlemen he was addressing had become *common criminals!*

Prefaced to the 1875 Report of the National Board is the following extract from an address delivered by John Bright to the English body: "I believe it is objected by some persons that great questions are for the Legislature and not for Chambers of Commerce. I should like to ask what would Parliament be, if it were not for *that public opinion* which not only *instructs* it, but *impels it forward?*"

In the Introductory Note to the Report for 1896, (p. v.), it is stated that recently a committee of this body had appeared before the Senate Interstate Commerce Committee, and that a priuted report of the proceedings had been published.

A list of the Exchanges who are members of the National body is printed on pp. xiv. and xv. of the 1896 Report. That list includes the Baltimore, Boston, Buffalo, Chicago, Cincinnati, Kansas City, Louisville, Omaha, New Orleans, Philadelphia, St. Louis and Toledo Grain Exchanges; also, the general Trade Exchanges at Baltimore, Boston, Buffalo, Cincinnati, Cleveland, Columbus, Indianapolis, New Orleans, New York, Philadelphia, Pittsburg, Providence, Rochester and St. Louis; and the New York Cotton Exchange most of which have been noted, *supra.*

A glance at the official Programme for the 1896 meeting and at the list of resolutions adopted, (Report, 1896, pp. 22–48; 253–267), will demonstrate how constant and numerous are the instances in which these bodies have been brought to the attention of Congress, and also enable one to judge how much truth there is in the charge that they are seeking to *restrain* the commerce of the country.

Among the subjects discussed were these: Consular Service, Currency Reform, Monetary Commission, Bankruptcy Legislation, Improvement of Navigable Water Ways; Coast Defences; Nicaragua Canal; Creation of a Department of Commerce; Railway Pools; Freight Classification; Merchant Marine; Extension of

American Export Trade; Reciprocity; Arbitration; Postal Rates; Trade Marks; Crop Reports; and Pure Food Laws.

VI.

The Legal Status of an Exchange.

It is now established that such an Exchange is *not engaged in business*, in any proper sense of the term. It is an aggregation of persons who, for convenience, provide a place "in which *each for himself*, and for his individual profit, may promote *his own business*. The association does not share in the profits or losses of the individual associates. Each member takes his own gains and each individual sustains the losses incident to his own engagements."

White v. Brownell, 2 Daly, 329, 336, 355, 356;
Leech v. Harris, 2 Brewst., 571, 575, 576;
American Com. Co. v. Live Stock Exchange, 143 Ill., 210, 226;
Dos Passos, Stock Exchanges, 13, 15.

"The purpose is not business, trade or profit, but the benefit and protection of its members as provided for in its constitution and by-laws."

Lafond v. Deems, 81 N. Y., 507, 514;
Albers v. Merchants' Exchange, 39 S. W. Rep., 473, 478 (Mo., 1897).

In People v. Chicago Board of Trade, 80 Ill., 134, 136, it was said: "This organization is not maintained for the *transaction of business* or for pecuniary gain. * * *It is not engaged in business, but only prescribes rules for the transaction of business.*"

Baxter v. Board of Trade, 83 Ill., 146;
Sturges v. Board of Trade, 86 Ill., 441.

So that, at most, the contract forming such an Exchange is an agreement among certain persons:

a. To establish a market and facilities for the transaction of business;

b. To codify the usages of the particular branch of business, and such reasonable regulations, as experience has proved to be proper or essential to its proper and successful conduct;

c. To admit such other persons as they may choose, possessing the prescribed qualifications;

d. To extend the privileges of their association to members only;

e. To terminate the privileges of membership upon violation of any of the prescribed rules;

f. To deal alone with their associates,and such other persons as conform to the prescribed rules, not, however, using any force, violence, or similar unlawful means to prevent others from dealing with other competitors, if they prefer to do so;

g. To inculcate fair and honorable dealing, and, by means of their facilities and rules,to increase the influence and importance of the market, to attract custom thereto, and induce an extension of its business, and, as a result, to benefit their own condition in life.

It is to be observed that the members individually compete with each other for the business which comes to the market, and that, individually and collectively, they must face the competition of rival markets and of all persons at the same market who are non-members of the Exchange.

Upon the plainest principles, and under all the authorities, there is not the slightest element of illegality in such a contract.

A Market Established.

a. To promote the establishment of a market for the transaction of business must be conceded to be a lawful purpose.

Grissell v. Bristowe, L. R., 4 C. P., 36, 53;
Maxted v. Paine, L. R., 4 Ex., 203, 218;
Duncan v. Hill, L. R., 6 Ex., 255, 266, 267;
Speight v. Gaunt, L. R., 9 App. Cas., 1, 21.

USAGES CODIFIED.

b. The codification of trade usages tends to produce uniformity and thus promote the orderly conduct of the business in question, which is a great benefit to the public.

Nickalls v. Merry, L. R., 7 H. L., 530, 546, 547;
Tompkins v. Saffery, L. R., 3 App. Cas., 213, 220, 227, 228, 232, 237, 238;
Grissell v. Bristowe, L. R., 4 C. P., 36, 48;
Connor v. Robinson, 2 Hill (So. Car.), 354, 358;
McMasters v. Pennsylvania R. Co., 69 Pa. St., 374, 378;
Goddard v. Merchants' Exchange, 9 Mo. App., 290, 296.

MEMBERSHIP A MATTER OF CONTRACT.

c. The right to admit and exclude persons has been many times adjudged. This right is absolute and beyond control.

White v. Brownell, 2 Daly, 329;
American Commission Co. v. Chicago Live Stock Exchange, 143 Ill., 210, 227-230;
Greer v. Stoller, 77 Fed. Rep., 1, 8;
McKane v. Adams, 123 N. Y., 609, 612;
Board of Trade v. French, 61 Ill. App., 349;
McQuillen v. Real Estate Exchange, 39 N. Y. St. Rep., 426; 19 N. Y. Supp., 206.

PRIVILEGES ARE INCIDENT TO MEMBERSHIP.

d. It necessarily follows that no person is entitled to membership or to any of the incidental or resultant privileges, against the will of the associates, or after having been suspended or expelled from the association.

"It is only an association of merchants dealing in the products of the country, who, solely for their own

convenience, provide a room where they meet to transact business. *They have a right to exclude all other persons from the meetings of the board, or to admit only such as they choose.*"

Metropolitan Grain Exchange v. Board of Trade, 15 Fed. Rep., 847, 849, 850, 851.
Bryant v. W. U. Tel. Co., 17 Fed. Rep., 825, 826;
Marine Grain Exchange v. W. U. Tel. Co., 22 Fed. Rep., 23;
Delaware etc. R. Co. v. Central Stock Yards Co., 45 N. J. Eq., 50; affirmed, 46 N. J. Eq., 280;
Horton v. Morgan, 19 N. Y., 170, 172;
Walls v. Bailey, 49 N. Y., 464, 473;
Wilson v. Commercial Tel. Co., 3 N. Y. Supp., 633, 636, 637;
Belton v. Hatch, 109 N. Y., 593;
Hyde v. Woods, 94 U. S., 523;
Board of Trade v. Nelson, 162 Ill., 431, 438.

The Exchange a Merely Private Body.

Such an association is not affected with a public use, nor can a court *enforce* the admission of a person to membership. When this bill was filed the Stock Yards were likewise private, and even if they are not to be so treated at the present day, in view of a Kansas statute of 1897, the constitutionality of which is now before this Court, and if a change of their legal status subsequent to the institution of the suit can be considered at all, in the absence of a supplemental pleading, this does not make *the Exchange a public body*, nor charge its *members with a public duty*. The parties are wholly distinct, so far as the present case is concerned. (Stock Yards Co. v. Mallory etc. Co., 157 Ill., 554, 562.)

"It does not follow that dealers resorting to said market for the purposes of trade would be subjected to

similar rules of public policy. They would deal with each other merely upon the footing of private parties, owing each other no duties except those which the rules of honesty and fair dealing impose. *Each would be at liberty to deal or decline to deal with each other precisely as he might see fit.* The rules of trade would be no different from what they are in other markets, whether public or private."

American etc. Co. v. Chicago etc. Exchange, 143 Ill., 210, 236;

Transportation Co. v. Parkersburg, 107 U. S., 691, 699.

This body can only be transformed into a public one by *legislative* action; not by the exercise of the judicial function.

Express Cases, 117 U. S., 1, 26, 29;

Little Rock etc. R. Co. v. St. Louis etc. R.Co., 41 Fed. Rep., 559, 569.

It follows, necessarily, and as a self-evident corollary, that it is not unlawful for the associates to decline to have business intercourse with expelled or suspended members, or with competitors, who conduct their business in violation of the rules of the Exchange, or who refuse to become members thereof, and whose action, therefore, marks not only the ordinary efforts of a trade rival but also a warfare upon the rules themselves and against the Exchange as a whole.

The law has been taken to be so settled; certainly since 1794, when Lord KENYON, in a discriminating opinion, held that an agreement between persons engaged in mercantile pursuits, for their mutual protection, was not only free from criticism on the score of public policy, but properly regarded as beneficial to the development of commerce. *Such agreements are offers to the public to serve them on the terms prescribed.* By employing a member a contract according to such terms results. Being engaged in private pursuit, the associates were free to serve or not, and this necessarily

carried the right to fix *the terms* upon which alone their services could be had. And it was quite as competent for *a member to agree* in these respects as it was for an individual to act on his own account.

Kirkman v. Shawcross, 6 T. R., 14, 16, 17;
Ladd v. Southern Cotton Press Co., 53 Tex., 172, 193;
Delaware, etc. R. Co. v. Central Stock Yards Co., 45 N. J. Eq., 50, 59–62; affirmed, 46 N. J. Eq., 280;
State *ex rel.* Attorney-General v. Smith, 114 Mo., 188, 199, 200.

As to members of such an association, "there are mutual advantages and the duty (to observe the rules) is but the equivalent for the benefits."

Player v. Vere, T. Raym., 324, 327;
White v. Brownell, 2 Daly, 329, 341;
O'Brien v. Grant, 146 N. Y., 163, 173.

It has been shown that Exchanges, from time immemorial, have been accorded the highest possible praise as agencies for the promotion of trade. Except for a brief period during the first frenzy of the French Revolution, they have, in every civilized land on the globe, been fostered by all departments of Government and the recipients of the plaudits of political economists and of the general public. The courts have assigned them a status in the law of the land which harmonizes and effectuates what is recognized as a commercial necessity. The resulting public benefits are so great that it cannot be fairly said that they are, in the important respects here involved, to be subjected to abstract rules announced in cases of combinations which have at various times been adjudged or assumed to be fraught with danger to the public welfare.

The circuit court, while recognizing (but only to a limited degree) the advantages to the public of Exchanges, felt constrained to adopt the contention of counsel for Greer, Mills & Co., who prepared the briefs

there submitted on behalf of the Government, that the recent case of United States v. Trans-Missouri Freight Association, 166 U. S., 290, was decisive of the proposition that *every association* of persons engaged in trade or in exercising an occupation as to their wages or commissions, or providing for business non-intercourse with given persons, *was necessarily and conclusively unlawful.*

In our judgment, there is nothing in the points actually decided in the Trans-Missouri case which warrants the conclusions expressed in the opinion of the circuit court, and the cases are clearly distinguishable. However, it is proposed to be shown that under any view which can legitimately be taken of that case, the action of the circuit court in the present instance was erroneous.

VII.

The Trans-Missouri Case, 166 U. S., 290, and its Bearing in the Present Instance, Considered.

In approaching a consideration of what is said in that opinion, it is important to remember the cautionary rule that, in determining the scope of a judicial deliverance, in its application to subsequent cases, the *precise facts* of the particular case in hand are to be carefully kept in mind. Detached passages of the opinion are not to be torn from their context, nor general expressions, which, taken by themselves, may be susceptible of a given construction, to be extended beyond the case then actually under consideration.

Cohens v. Virginia, 6 Wheat., 264, 399;
Hans v. Louisiana, 134 U. S., 1, 20;
Plumley v. Massachusetts, 155 U. S., 461, 474.

A striking application of this rule is found in comparing the opening sentences of Mr. Justice Bradley's dissenting opinion in Chicago etc. Railway Co. v. Minnesota, 134 U. S., at 461, with the remarks of the

Court concerning that opinion in the subsequent case of Budd v. New York, 143 U. S., at 545, 546.

Hence, in order to fairly apply what is said in the Trans-Missouri case, 166 U. S., 290, it is to be constantly borne in mind that the Court was dealing wholly with the status of railroad companies under the Act, and that the matter involved was the validity of a traffic arrangement concerning what was confessedly interstate commerce. In view of Mr. Justice PECKHAM'S thorough familiarity with the existence and rules of Commercial Exchanges and similar organizations, as shown by the cases decided during his service as a member of the New York Court of Appeals, and the similar knowledge which Mr. Chief Justice FULLER had gained during his extended practice at the Chicago bar and from his consideration of Sparhawk v. Yerkes, 142 U. S., 1, and the information which the other concurring Justices undoubtedly had concerning the existence of similar organizations in the cities at or near which they had resided in past years, or in which they had held court while circuit or district judges,—(Mr. Justice HARLAN in Cincinnati and Louisville; Mr. Justice BREWER in Kansas City, St. Louis, Omaha, St. Paul, and Minneapolis; and Mr. Justice BROWN in Detroit and Toledo),—it is impossible to believe that they meant that case, or any language employed in the opinion, to be applied to a typical American Exchange.

This is particularly true and clearly proved by the statement repeatedly made in the majority opinion that unless the Act applied to railroads, there was "*little for the Act to take effect upon*" (313), and, in that event, "*the whole Act might as well be held inoperative.*" (326). And yet it needs but a moment's reflection to appreciate that the interests to be affected by destroying the Exchanges of the land are probably *even greater* than those involved in traffic arrangements between railroads. The volume of business done on and by means of Exchanges not only largely exceeds the aggregate of

freight rates, but the value of the transactions there carried on is probably greater than that of all the freight transported by the railroad companies of the United States.

So far as that decision fairly has application to the case at bar, it decides:

a. The Act has no reference to any contract or combination between persons unless those persons are engaged in interstate commerce, nor unless the business in which they are engaged falls within the definition of "*commerce itself*," in distinction to being a mere *aid to commerce* or having only an *incidental or indirect effect thereon;*

b. While the language of the Act is general and is not to be limited to contracts which were in unlawful restraint of trade under common law rules, yet not every contract affecting or relating to trade is condemned. In every instance the Court must find that the contract in question, "*by its direct effect*, produces a *restraint* of trade," in the sense of inter-state commerce, (312, 313). This element is particularly important because asserted by way of a *proviso*, and that, too, in a vital paragraph of the opinion. Beyond all doubt, the Court intended to carefully exclude from the effect of its rulings all the many instances of personal services, and of other facilities to commerce, which had been so often adjudged to be "aids" to commerce, and of *benefit* thereto, and as not being obstructions, impediments or restraints, as disclosed by the cases herein cited, running from the auctioneer instanced by Mr. Chief Justice MARSHALL, through the list of decisions concerning brokers, wharfs, and artificial canals, locks, and dams, announced from time to time, down to the grain warehouses considered in Budd v. New York, 143 U. S., 517, 545. This is especially true because the Court had but very recently laid it down, in the most emphatic terms, that if a given arrangement had the effect to *promote and facilitate* the transaction of business, it could not be said

that Congress had intended to inhibit it. For "commerce, in its largest sense, must be taken to be one of the most important subjects of legislation, and an intention to *promote* and *facilitate* it, and not to *hamper* and *destroy* it, is naturally to be attributed to Congress."

Texas & Pac. Railway v. Interstate Com. Commission, 162 U. S., 197, 218, 219;

c. Where the contracting parties are charged with a *public duty*, as railroads are, it follows that it is a correlative right of the public that they shall not enter into contracts with others engaged in the same business affecting the discharge of that duty. But where the business is *merely private*, the inquiry is one of fact: Does the particular contract *actually* restrain trade? As said by Judge SHIRAS, in the quotation made from his opinion by the Court, in accordance with the distinction firmly established, a century before, in Kirkman v. Shawcross, 6 T. R., 14, 17, "the same test is applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein." (336.) This thought was again expressed by Judge SHIRAS in this language: "Touching contracts between private parties in regard to pursuits essentially private in their nature, the test of validity we thus find to be the *actual effect* thereof on the public welfare." (58 Fed. Rep., at 86.)

These views of the opinion of the Court in that case are, as we submit, emphasized by these considerations:

The common law rule that courts would not lend their aid to enforce given contracts because they were in restraint of trade rested upon considerations of *public policy*. It is now conclusively established that such contracts were not illegal, in the sense that it was criminal to make or perform them. As public policy dictated the rule in the first instance, it necessarily followed that

the rule itself shifted with the view which the courts took of that policy under varying conditions. Hence it was, that in the course of time many contracts were declared to be binding and were affirmatively enforced which previous cases would have denounced. In England, the tendency outlined by Lord LANGDALE, Sir GEORGE JESSEL and Lord Justice JAMES formed the basis of Mr. Justice FRY'S great judgment in Rousillon v. Rousillon, 14 Ch. Div., 351, and of Mr. Justice CHITTY'S opinion in Badische Fabrik v. Schott, 1892, 3 Ch., 447, and the rules there announced have, after a masterly examination of the subject, become finally and authoritatively established.

Maxim–Nordenfelt Gun Co. v. Nordenfelt, 1893, 1 Ch., 630; affirmed, 1894, App. Cas., 535.

The luminous opinion of Mr. Justice BRADLEY in Navigation Co. v. Winsor, 20 Wall., 64, largely influenced the adoption of an equally liberal rule by the American courts—a view which is now accepted law.

Gibbs v. Baltimore Gas Co., 130 U. S., 396;
Fowle v. Park, 131 U. S., 88;
Diamond Match Co. v. Roeber, 106 N. Y., 473;
Leslie v. Lorillard, 110 N. Y., 519;
Tode v. Gross, 127 N. Y., 480.

It had become established that there was no hard and fast rule on the subject, but that each case, as it arose, should be determined by an inquiry whether the restraint in question was reasonable, the particular circumstances considered.

Until this Court determined the Trans-Missouri case, all the judges who had been called upon to consider the Act of Congress of July 2, 1890, had decided, or assumed, that contracts which were not open to objection on the score of being in unreasonable restraint of trade under common law rules, were not violative of the Congressional enactment. The construction put upon the statute by this Court proceeded upon the con-

clusion that the common law rule on the subject *did not in any way enter into the legislative intent.* Assuming that this conclusion is to be adhered to, it necessarily follows that the statute must be taken to have cleared away *all the common law rules* on the subject. It cannot be said that Congress intended to invalidate every contract which a common law court would have declared to be in restraint of trade, though valid because the restraint was reasonable, and, also, to declare all contracts to be thus in restraint of trade which the English courts, possibly centuries ago, would have held or assumed to be in such restraint, though, perhaps even then, valid because not unreasonably so.

In other words, there is nothing to warrant the construction that in the last decade of the Nineteenth Century, an American Congress intended to adopt the doctrine of *a constructive restraint of trade* which is outlined in some of the earlier English cases, under the influence of a public policy long since swept away by advancing civilization, and which has been overthrown ever since Mitchell v. Reynolds was decided by Lord MACCLESFIELD in 1711, (1 P. Wms., 181). Followed to its logical conclusion, such a construction would reinstate the passionate and somewhat profane declaration of HULL, J., in Dier's case, nearly six hundred years ago (1415). It would put Congress in the attitude of having adopted a rule of action and a public policy in respect of matters of commerce which stand forth in history as *relics of the Dark Ages*, and which are regarded as marking a time when *a languishing trade was vainly struggling for a foothold.*

It was not until her public policy, and her judges as expounders thereof, had yielded to a recognition that freedom of trade meant as well *an absence of artificial restrictions imposed upon the liberty of contract by judicial construction*, that England began that progress in matters commercial which has justifiably become the proudest boast of her people, and which it has been

and is the chiefest aim of other civilized countries to emulate. It would be absurd beyond expression to say that although in point of fact a given contract was intended to and did *actually promote* trade, yet the Act of Congress denounced it, because a long-since obsolete rule of the common law would have adjudged the same contract to be *constructively* in restraint of trade, though, perchance, nevertheless, valid.

One of Lord ERSKINE'S greatest achievements was that, in Lord George Gordon's case, he "successfully combatted the doctrine of *constructive treason*, a doctrine highly dangerous to the *public freedom*," and one which he trenchantly characterized to be "an abundant source of that *constructive cavil*." (1 Erskine's Speeches, by High, pp. 85, 91).

Speaking of a similar subject Mr. Curran, (Johnson's case, Curran's Speeches by Callaghan & Co., 1877, p. 590), used this fervid language: "*The same wild and impious nonsense* of constructive criminality—the same execrable application of the ill-understood rules of a vulgar, clerk-like, and illiterate equity."

If every agreement between two or more persons concerning the *manner* in which their occupation shall be carried on, or the compensation which they are to charge for their services, is intradicted by the Act of Congress, than an ordinary partnership between commission merchants, attorneys, physicians, architects, engineers, or persons engaged in any other occupations, (and as to all of these the element of interstate commerce may be quite as conspicuously present as it is in the case in hand), must likewise be declared to be unlawful.

Suppose that two persons who had been engaged in the business of live-stock commission merchants, each for himself, should conclude that by forming a partnership, their expenses for office-rent, salesmen, solicitors and other employes, telegrams, postage, etc., would be greatly reduced, and they be otherwise benefited, and

should accordingly stipulate in their articles of copartnership, for the express purpose of earning the largest possible income at a minimum outlay, as to the rates of commission to be charged, the number of solicitors to be employed, and the sending of prepaid telegrams, would the arrangement be a combination or conspiracy in violation of the Act of Congress?

An affirmative answer would, in effect, destroy fully 95 per cent. of the mercantile establishments in the United States. No one would have the hardihood to insist that such a construction of the Act embodied *effectuation of the legislative intent.* Beyond all doubt such arrangements would be upheld, and for reasons not difficult to appreciate:

a. They have existed so to such an extent and for so long a time, as to be universally known, and experience has proved them to be *promotive of trade,* and, therefore, *beneficial to the public.* Hence, Congress cannot be presumed to have intended to transform the associates into criminals and to subject their capital invested to forfeiture, by a mere general declaration, nor by any language short of an explicit and unequivocal provision describing them in express and unmistakable terms.

b. The statement that the common law rule on the subject of contracts in restraint of trade, has not passed into the Act of Congress, logically means that *no part* of it has a place in the construction of the statute. If *one branch* of the common law rule—an integral part of a complete judge-made codification of the rules of public policy on the subject—has been displaced by Congress, the statute must be looked to as a *full* substitute for the previous law on the subject. There is nothing to indicate an intent to adopt *part*, but *not all*, the common law doctrine in the premises. If it be held that the doctrine of reasonable restraints of trade has been eliminated, it necessarily follows that *an entirely new rule has been evolved.* The generality of the

language of the statute is such that its adjustment to existing conditions must be by way of judicial construction, in the light of established canons. Among these are, 1, absurd, unjust, and unreasonable consequences must be avoided; 2, an intention on the part of Congress to promote and facilitate commerce and not to hamper or destroy it, must be assumed; 3, general expressions must be limited so as to exclude such matters as cannot be presumed to have been intentionally legislated against; and, 4, this is a highly penal statute, and great liberality is, therefore, to be indulged in the effort not to condemn the innocent or praiseworthy: the spirit and not the letter is to be regarded.

THE ACT ONLY APPLIES TO CONTRACTS AND ASSOCIATIONS WHICH ARE ACTUALLY INJURIOUS TO TRADE.

In short, the Act being intended, (as declared in its title) to "*protect*" trade against restraints, it is first to be ascertained whether the particular contract is such that trade needs to be protected against it. Trade, as well as an individual, does not seek to be shielded from that which is *beneficial;* on the contrary, it naturally desires to enjoy every possible benefit and advantage, and will doubtless strive to further a tendency to bestow the same, in every conceivable way.

State *ex rel.* Attorney-General v. Smith, 114 Mo., 180, 197.

When the question arises whether a given agency or association of persons is injurious to trade—inimical to its development—courts look in the first instance to the history of commerce, in order to ascertain what influence has been thereby exerted in the past; whether the effects have been beneficial or baneful, the purpose good or evil; and what views have been taken in the premises by courts, legislative bodies, departmental

officers, political economists, and others proper to be regarded as speaking the intelligent conclusions of a commercial people. If this investigation and a consideration of other relevant matters shown by competent proof, or of such general knowledge that they fall within the range of judicial notice, establish that the agency or contract in question is, on the whole, *promotive* of trade or *beneficial* to its proper conduct, it cannot logically or truthfully be said that it *restrains*, *i. e.*, *interferes with or injures*, trade. There is, in that case, no room for applying a doctrine of *constructive* restraints.

Nor can it be held that Congress intended trade to be *protected* against that which is to its promotion. Such a ruling would be to deny to trade the right to have those advantages which have been evolved, from experience and even from necessity, for the purpose of facilitating its exercise and development. With due deference, it would be the height of absurdity to say that under the guise of protecting trade from injury, it is to be deprived of the benefits of arrangements which the common sense of mankind and the universal experience of history have shown to be both proper and essential to its orderly conduct and full development. For "*prohibition of trade is destruction to trade*"—(*In re* Rebman, 41 Fed. Rep., 867, 875).

The conclusion must be that when such an agency is brought under judicial review, it can be condemned only upon proof, that *in the given case*, it is, in point of *actual fact*, *injurious* to trade, (ERLE, J., in Hilton v. Eckersley, 6 E. & B., 46, 58, 59; Curtis v. Gokey, 68 N. Y., 300, 304). Of course, the injury may appear from the admissions in the pleadings or on the face of the contract. But unless it so appears there must be proof of the fact that trade is *actually* (in distinction to *constructively* or *theoretically*) restrained. A mere contract between persons engaged in trade is not conclusively, nor even presump-

tively or *prima facie*, in restraint thereof. (Lord ABINGER in Lewis v. Davidson, 17 L. J., Ex., 78, 79.) Self-evidently, many contracts are highly promotive of trade. Indeed, without contracts, there could be *no trade;* for all trade consists of *a contract in some form.* If the contract in question constitutes a usual incident of trade, or evidences a mode of carrying it on which is sanctioned by the consensus of mercantile experience and opinion, why deny its validity? (L. R. 10 Ex., at 353; L. R. 4 C. P., at 48, 53; 2 Hill So. Car., at 358.) The Act under consideration only denounces it when it has been found, as other issues are adjudicated, that trade is, *in point of actual fact*, restrained, and consequently subjected to an injury from which the public requires to be protected. (Attorney-General v. North Jersey St. Ry. Co., 54 N. J. Eq., at 267.) It would be as novel, as it would be detrimental to trade, to say, under the plea of protecting it from *injury*, that it shall be denied that which, in truth, is to its *advantage*.

Accordingly, we think that the emphasis in the Trans-Missouri case, in so far as it is to be treated as laying down general rules, is to be placed upon the statements in the opinion that a contract is to be condemned under the Act of Congress when (*and only when*) "such contract by its *direct effect* (i. e., *actually*) produces a restraint of trade," (166 U. S., at 312, 313), and that the Act applies only to "those contracts which *in fact* restrain or may restrain trade." (328.) Strong support is given to this view by the implied concession that a contract of sale, accompanied by a covenant on the part of the vendor not to engage in the same business would not be "within the letter or spirit of the statute in question." (329). The reason for this admission, be it stated as it may, is decisive of the present controversy; for certainly, the law of 1415, as expounded by Justice HULL, would have invalidated such a covenant on the part of a vendor.

We submit and insist that the rules of the defendant

Exchange are valid, whether they be judged by either of the elaborate opinions delivered in that case. For it will appear that in their effect on trade or commerce, Exchanges are and always have been promotive thereof. They do not restrain it, in intent or in fact, and never have done so. An Exchange, as such is not engaged in any business whatever, and usually (as here) its members are merely *exercising an occupation*, in distinction to being *engaged in trade or commerce*. That competitors are restrained *in their efforts to successfully compete*, has not been deemed to be in restraint of *trade* (as distinguished from traders) by any well-considered definition, unless unlawful means are resorted to—such means as mark the advent of a conspiracy to use force, intimidation, or the like.

This is nowhere more clearly recognized than by Lord ESHER, in his dissenting opinion in Mogul S. S. Co. v. McGregor, 23 Q. B. D., 598. With manifest reference to Reg. v. Rowlands, 5 Cox C. C., 460, and 17 Q. B., 686, *n.*, and similar cases in which the right of persons engaged in a private occupation to associate for their mutual advantage was conclusively established, the learned Master of the Rolls was careful to say that "the head of the law which we are considering *applies only to trade and traders*" (23 Q. B. D., at 609), which is "*perfectly distinct*," especially in this respect, from that which governs where an *occupation* is involved. (Lord ELDON, 18 Ves., 437; Queen Ins. Co. v. State, 86 Tex., 250).

Live-stock commission merchants are "*not buyers and sellers*, but factors—*agents to sell*."

Union Stock Yards Bank v. Gillespie, 137 U. S., 411, 415.

And "the rules of an Exchange are merely machinery to bring the two parties (principals) together."

Bowring v. Shepherd, L. R., 6 Q. B., 309, 327; Fowler v. Gold Exchange Bank, 67 N. Y., 138, 142.

ALL ASSOCIATION IS NOT NECESSARILY UNLAWFUL.

Since the preparation of the principal brief this Court has substantially sanctioned the correctness of the contentions therein urged anent the Trans-Missouri case (pp. 208-214.)

Hyer v. Richmond Traction Co., 18 Sup. Ct. Rep., 114.

It was there held that association is not, of itself, a combination condemned by considerations of public policy, for, otherwise, partnerships and corporations would necessarily be criminal. Where the fact of association, the purposes thereof, and the terms of the agreement reached, are published to the world, illegality can only be adjudged upon proof of *actual injury* to the public. The doctrine of *constructive wrongs* (quoting from Kearney v. Taylor, 15 How., 494, 520), "is too narrow and limited for *the practical business of life*, and would oftentimes *lead inevitably to the evil consequences it was intended to avoid.* Instead of encouraging competition, it would *destroy it.*" Each case must depend upon its own circumstances, and every instance involves an inquiry of *fact*: Whether the particular contract or arrangement was *intended to accomplish such injury*, or whether that be its effect or *necessary* tendency. Where the matter affected is not one which *must, perforce, take place*, (such as a judicial or foreclosure sale), but depends upon contract to be entered into between man and man, entirely different considerations apply, a distinction somewhat akin to that between matters and things affected with a public use, and merely private occupations (18 Sup. Ct. Rep., at 117, 118).

That the analogy of partnerships and private corporations thus instanced, and also urged at page 209, *supra*, is, *when viewed from the standpoint of considerations of public policy*, both perfect and complete, has been shown in a recent and well-considered opinion.

Smith v. San Francisco etc. R. Co., 115 Cali., 584, 600 *et seq.* (1897).

And Judge BRAWLEY, when Hyer v. Richmond Traction Company was heard in the circuit court of appeals, (80 Fed. Rep., at 846), aptly and forcibly drew the distinction that "a rule that might be justly applicable to a kind of business which could not be restrained to any extent whatever without prejudice to the public interest, ought not to be arbitrarily extended so as to interfere with *that freedom of contract which is a fundamental right.*"

The nature and scope of the *fundamental right* thus alluded to are admirably shown in the address delivered by Hon. James M. Woolworth as president of the American Bar Association, 1897, in this language:

"The declaration that all men are endowed with a right to 'life, liberty and the pursuit of happiness' is not satisfied by assuring an existence as animals, nor by freedom from physical restraint. That is the smallest part of their contents. Each by itself is a great word—*the greatest tongue ever uttered*. But one reflects its meaning upon the others, so that all of them coupled in one phrase encompass the exercise of all the faculties and capacities of men, so as to give to them their highest enjoyment. Thus, there are *the callings in life, trades and pursuits which have always been followed in all communities from time immemorial.* The right to pursue them, without let or hindrance, is an ingredient of happiness, without which, life is not worth living, nor liberty worth having. And then, furthermore, there is *the exercise of the faculties and capacities of men in complex, highly developed, industrial societies, which gives to them a vastly higher enjoyment;* as where men subdue the forces of nature to their service, and where they combine and *associate together for ends beyond the competency of individuals. These last as well as the former are the fruition of the liberty of American citizens which*

they claim as their birth-right. The object and justification of governments among men is to secure these rights *in full measure and proportion;* and any exercise of power, whether by edict of Emperor, decree of Parliament, or act of Legislature, which lays upon them *a burden of any sort,* is without *defense, apology, or excuse.*"

Proceedings, American Bar Association, 1897, pp. 241, 242.

In the case at bar, it is emphatically true that the employment of one of the defendants to act as a commission merchant, and the consequent obligation to compensate him according to the schedule under which he has declared himself to be willing to serve, are matters of a purely private contractual nature. His rights are none the less sacred because his rate of wage is on the basis of the reasonable value of such services when rendered by a member of a "highly developed industrial society" under the safe-guards and aided by the facilities provided by its rules.

Thus, if a person owning property is desirous to sell the same because of his necessities, be they ever so pressing, an arrangement between two or more persons upon a price which they were willing to pay, would not, for that reason, be void, or, (if the transaction be interstate in its character), mark a violation of the Act of Congress. The result would not be changed because the property was such that it could be sold to best advantage at a given market, or only to a certain limited number of persons. For instance, if shares of stock were best (or even only) salable at some one place, the buyers doing business there would not, therefore, stand debarred from agreeing among themselves to bid thereon in common, or not beyond a named fair price; or, if the property were land, whose chief or only substantial value was because of its coal deposits, the persons engaged in coal mining in that district and who alone might be interested in purchasing the same, could not

be compelled to bid against each other, nor be denied the right to buy on joint account.

Even when a monopoly by royal grant came under consideration, it was laid down, more than three centuries ago, in a much argued and very important case, which has ever since been regarded as the leading one on the general question involved (11 Pet., at 606, 607), that "a monopoly is no immoral act, but only against the politic part of our law. If it happen to be *of advantage to the public*, as this trade is, then *it ceases also to be against the prohibiting part of the law*, and so not within the law of monopolies."

East India Co. v. Sandys, 10 How. St. Tr., 371, 518.

The Lord Chief Justice pointed out that from the earliest periods the crown had "granted the liberties of fairs and markets *for the sake of commerce and trade*;" for instance, the grant to the Abbot of Westminster to hold a fair each year, lasting thirty days, "with a prohibition that no man should buy or sell *within seven miles of that fair during that time*." And it was shown that the *public interest was much benefited* by recognizing and fostering such exclusive fairs and markets, because their effect was, "as Mr. Attorney-General did well observe, to prevent *frauds*, *deceits*, *and other abuses*, either in weights, measures or otherwise, which would certainly *interrupt such commerce*" (10 How. St. Tr., at pp. 523, 524).

Hyde v. Richmond Traction Company is not only supported by the cases cited, but by a large number of others, a late and strikingly parallel one being Oakes v. Cattaraugus Water Company 143 N. Y., 430, 438, 439.

The last mentioned case is entitled to particular weight because the New York courts have generally held views upon the subject which have elsewhere been regarded as unjustifiably extreme.

Breslin v. Brown, 24 Oh. St., 565, 571 and cas. cit.;

Greenhood, Public Policy, p. 191.

However, in a much considered case of the greatest importance, the Court of Appeals of that state distinctly ruled that agreements, even among persons intending to bid for the doing of *public work*, were not necessarily illegal. "They may be entered into for a lawful purpose and from honest motives, and in such cases may be upheld," approving, among others, Jones v. North, L. R., 19 Eq., 426. Such agreements are denounced only when, thereby, *unreasonable bids* were successfully made or some *undue advantage* obtained. Otherwise, they are regarded as innocuous and immaterial.

People v. Stephens, 71 N. Y., 527, 546, 547.

So this Court had ruled on a previous occasion that "the validity of such an arrangement depends upon *the intention* by which the parties are animated, and *the object sought to be accomplished.*"

Wicker v. Hoppock, 6 Wall., 94, 97.

In addition to the cases cited in Hyer v. Richmond Traction Company, *supra*, the following authorities support the conclusions there expressed:

Smith v. Ullman, 58 Md., 183, 190;

In re Carew's Estate, 26 Beav., 187, 189;

Holmes v. Holmes, 3 Rich. Eq., 61, 64, 65;

Smull v. Jones, 6 W. & S., 122, 126, 127;

James v. Fulcrod, 5 Tex., 512, 522-7;

Cohen v. Envelope Co., 9 App. Div. (N. Y.), 425;

Meredith v. New Jersey Zinc Co., 37 Atl. Rep., 539, 542, (N. J. Eq., 1897).

Indeed, it is upon an application of this principle that the courts so warmly commend Reorganization Agreements, especially where admission to the privileges thereof is offered to all qualified applicants.

Kropholler v. St. Paul etc. Ry. Co., 2 Fed. Rep., 302;

Wetmore v. St. Paul etc. Ry. Co., 3 Fed. Rep., 177, 184; s. c., 5 Dill., 531, 535, 536;
Pennsylvania Transp. Co.'s Appeal, 101 Pa. St., 576, 582.

Such agreements, although always calculated and many times directly operating, to constructively restrain a given degree of competition and the free action of the parties as independent factors, are yet deemed essential to the protection of the parties and to be promotive of the general welfare.

Robinson v. Philadelphia etc. R. Co., 28 Fed. Rep., 340;
Central Trust Company v. U. S. Rolling-Stock Co., 56 Fed. Rep., 5, 7.

In view of the contentions on behalf of the government in the present case, it is a pertinent inquiry whether such an agreement concerning an interstate railroad would be a violation of the Act of July 2, 1890. What argument can be advanced in favor of the typical Reorganization Agreement which does not apply with at least equal force to a Commercial Exchange?

And while an agreement fixing a table of wages has been deemed to stand upon a distinct ground of vantage, yet the principal arguments relied upon by the Government in the present case are readily overcome by the conclusions reached in respect of combinations even in reference to bidding at forced sales. To the extent that an analogy may fairly be drawn in the premises, the present case would, however, fall within the rule laid down in Morrison v. Darling, 48 Vt., 67, 71, 72, and declared to embody a "fundamental right," by Judge BRAWLEY, *supra*.

Thus, it was strenuously urged below that if the right to agree on *reasonable* commissions were conceded, it would necessarily follow that *extortionate* charges might, on the same principle, be lawfully fixed and exacted. This is not only a complete *non sequitur*, but

confuses the very distinction between an agreement free from injury to the public, *i. e.*, not operating to restrain or injure trade, and one whose real purpose is to obtain an undue advantage to the detriment of the public welfare (National Bank v. Sprague, 20 N. J. Eq., 159, 169). The former has for its objects, to regulate the *orderly conduct* of the occupation in question; to secure *uniformity*; to avoid *discriminations*; and to promote the *development* of the industry referred to, none of which can or do result injuriously to the public, or to trade and commerce. The latter would present the elements which are essential to a conclusion that public policy had been offended: an *undue advantage* gained; *oppression* practiced; and an *injury* inflicted upon the public interests.

Phippen v. Stickney, 3 Met., 384, 388, 389;
Marie v. Garrison, 83 N. Y., 14, 28.

The suggestions of the Government in this behalf rest upon a purely speculative basis. There is nothing to justify the assertion that the rules of a single Exchange provide for a commission charge, as to the propriety or fairness of which there is the slightest room for doubt. No such apprehended extortion has been attempted in the past. Considering the circumstances, the purposes of these organizations, and that if such a folly were attempted, the members would inevitably and immediately be the greatest, and probably only, sufferers as a result, the possibility that such an apprehension will be realized in the future is too absurdly and inconceivably improbable to be made the pretext for destroying such bodies *in toto*, and at a time when they are making neither claim nor effort to do aught which offends in the slightest degree the sternest sense of public or sociological morality.

It was well said by Judge BRAWLEY, (Hyer v. Richmond Traction Co., 80 Fed. Rep., at 847),—and the statement is fully covered by the approval which this Court has given to his opinion in that case—that

"to hold a contract void because its tendency may be to defeat competition, it must appear that the benefit to be derived from it (*i. e.*, an undue advantage operating to the injury of the public), is *certain and substantial*, and *not theoretical and problematical*."

Whatever force the suggestion referred to might have if offered in support of the propriety of legislating so as to prevent *abuses* or *extortionate practices*, it lends no support to a demand for the *complete annihilation* of the right to form associations, however meritorious or innocent they may be. To forbid the *abuse of a privilege* is far different from *destroying the privilege itself*.

It was likewise insisted below that our argument that a schedule of *reasonable commissions* may lawfully be prescribed, was in effect, a contention that a contract in *reasonable restraint of trade* was not inhibited by the Act of Congress. It is not perceived that there is the slightest connection between the two propositions. Certainly, the use of the same adjective in each of them is merely a verbal coincidence.

Fairly stated, our proposition is that a schedule of reasonable commissions does not operate, and cannot operate, to restrain trade *in any degree whatever*. Clearly, the occupation and functions of a broker or commission merchant, as such, are not in restraint of trade. A contract with a principal to serve him in that capacity would not violate the Act of Congress. On the contrary, such agents and intermediaries are universally recognized as most valuable aids to commerce and as absolutely essential to its successful conduct. And, self-evidently, as this laborer is also "worthy of his hire," a contract to compensate him must be free from criminality. As mere association is not, *per se*, unlawful, how can it be said that injury to the public, or a restraint of trade, can result from *the mere fact* that the compensation for which the agent is willing to serve, stands prescribed by an honorary schedule embodied in the rules of an Exchange? If the rates thus fixed are

reasonable, can trade be said to be restrained thereby in any different degree than would result from an express agreement between principal and agent in each isolated instance? Such restraint or injury could only exist, at the very utmost, upon proof of the superadded element that *unreasonable charges* have been exacted under such circumstances of compulsion as to disclose extortion or coercion in the sense of duress as defined by the law.

To repeat, reasonable charges for services faithfully rendered—a fair compensation for an equivalent sought and received—do not operate to restrain trade *in any sense whatever*. The Act of Congress certainly did not intend to prohibit the continued exercise of this lawful occupation, without which there could, indeed, be no such thing as trade. It cannot be said that in order to escape the penalties of the Act of Congress and to avoid restraining trade, the occupation must be exercised *gratuitously!*

If, instead, of using the term "reasonable commissions," the statement be phrased that no more than a *fair compensation* is provided for, can it still be said that *such* a compensation *restrains* or *injures* trade? Or that the case is changed by the mode adopted to indicate the measure of that compensation?

In his great argument in Gibbons v. Ogden, Mr. Webster emphasized that "*useful regulation*" of commerce is far different from a "*restraint*" thereof—a distinction which is established, with direct reference to the question under consideration, by the greatest conceivable weight of authority (Brief, pp. 99 *et seq.*)

Even where the Government was offering vast tracts of land at public sale, the formation of a powerful syndicate, bound together by an agreement that no bids should be made beyond a named price, was adjudged to be free from illegality. It was held to be necessary to further prove *actual fraud* in manipulating the sale, or that, as a result of the combination, the

bidding was depressed to such an extent that *the property was sacrificed.*

Piatt v. Oliver, 1 McLean, 295, 301, 302; s. c., 2 McLean, 267, 277, 278, 281; affirmed, 3 How., 333.

And it has been repeatedly enjoined that great care should be taken not to confound agreements which are reasonable to the occasion and in fact advantageous to all concerned, with those fraught with injury or inspired by improper motives.

Gardiner v. Morse, 25 Me., 140, 143;
Smull v. Jones, 6 W. & S., 122, 126;
Smith v. Greenlee, 3 Dev., 126, 129;
Greenhood, Public Policy, p. 191.

When Competition is Beneficial.

It is also to be remembered that the competition in which the public can be said to be interested is widely different from that degree of *rivalry* which has for its sole or leading purpose a mere desire to defeat or injure a competitor. Indeed, an association to carry on such a rivalry would stand in danger of being condemned as a *criminal conspiracy*, *i. e.* a combination intended, proximately, to inflict injury upon another. Would it be criminal to agree *not to permit a conspiracy of this description to come into being?*

This inquiry points the middle-ground which marks the bounds of lawfulness: The competition which public policy requires to be observed is fully met (at least) when the prices bid, paid or charged (as the case may be) are reasonable, the circumstances considered, and when no improper practices are resorted to or undue advantages sought to be gained.

"There is a competition that *kills*, as there is a combination that *saves*" (80 Fed. Rep., at 847). A contrary doctrine "would be as pernicious as the evil

against which the true rule is intended to guard" (15 How., at 520; 18 Sup. Ct. Rep., at 117).

Breslin v. Brown, 24 Oh. St., 565, 570.

The greatest safety to the public—especially in matters of mere personal services—lies in a steadfast recognition of the conclusion expressed by a high authority, in turn quoting from one whom he characterized as a "widely experienced writer," that "competition to be effectual must be *constant*, *not fitful*, and be limited by a reasonable regard to the actual condition of the business; not inspired by *the wild avidity of the mere bandit*."

"Lloyds," 45 Fortnightly Review, at 537.

In short—to apply the illustration of counsel below—if the defendants should fix the manifestly unreasonable commission of five dollars for selling each head of cattle, who would be more seriously hurt than they themselves, by the inevitably resulting diversion of consignments to Chicago, St. Louis, Omaha, Fort Worth, and other competitive points? If the (it seems to us) ridiculously extreme and practically impossible case be put that *all* live-stock commission merchants throughout the United States might combine to insist upon a five dollar rate, how long would it be before sellers and buyers would make their bargains without the employment of an intermediary? How long before others would offer to serve at the reasonable rates now prevailing? How long before public sentiment would enforce a correction of the abuse? Who would suffer more, in the way of retaliation, than those who have thus sought to wrong the public? Unless, indeed, the Attorney-General, according to the precedent set in the present instance, will permit them to use the name of the United States to obtain an injunction restraining such persons as they may choose to make defendants from refusing to thereafter deal with them, singly or in concert, with or without reason, and mandatorily enjoining the defendants to have such dealings, *nolens*

volens, (*vide*, order here appealed from, Record, 277).

It would follow that by agreeing to ask a given compensation (even if the rate be ever so reasonable), A and B would be guilty of making a *contract* in violation of the statute; and by refusing to deal with them, C and D would become "boycotters," and as such guilty of a *conspiracy* under the same statute!

The Real Interests of the Public.

Taking the case as it is, and applying the experience of the past, the precise question is, which of the following alternatives shall be judicially declared to be in the interest of trade:

a. An association of reputable merchants, deeply concerned in building up and maintaining a market, not for mere temporary advantage but as a permanent benefit to all concerned; who recognize, as Ex-Secretary Carlisle once well said, that "Commerce is not war; it is peace"; a code of rules framed and improved from time to time with an eye-single to increasing facilities, inspiring a feeling of public confidence, and insuring the orderly conduct of the occupation under a high standard of commercial honor, relentlessly enforced; and a schedule of commissions affording no more than a fair compensation for efficient services faithfully performed, and protecting all from the intolerable evils of favoritism and discrimination; or,

b. A condition of commercial chaos and anarchy, in which the controlling ambition is to fleece the unwary, without hope of a second opportunity; when the least scrupulous may, by exercising "the wild avidity of a bandit," succeed in overcoming all competitors who are prosaic enough to be guided by considerations of commercial propriety and common honesty, and, having destroyed the market, be at liberty to enjoy his ill-gotten gains or to seek pastures new; where facilities and confidence are mere empty names; and under which

rebates are granted to the favored few at the expense of the many, inadequate commissions charged for equally inadequate service, and the loss incident to conducting an occupation for less than the *actual expense* incident to rendering faithful service (Record, 179, 180, 182), will, necessarily, be recouped by secretly taking advantage of the public in other respects.

It is for this Court to decide between the two, in the light of the great trust confided to it to effectuate a legislative intent to protect the trade of our great land and to conserve the welfare of the American people and their commerce.

The cases concur in holding that a wrongful purpose is not to be presumed; that the existence of the proscribed intent, effect, or necessary tendency involves an inquiry of fact; and that whether a given arrangement is beneficial or injurious, and whether it is in accord with or inhibited by public policy, (be that policy a matter to be declared by the courts or embodied in procrustean statutory enactments), can best be determined in the light of the actual results of its practical operation.

Phippen v. Stickney, 3 Met., 384, 388–9.

If that operation has been long continued and has affected a large number of persons and a great volume of business, it is the easier to judge of that result and the weightier the proof thereby disclosed. In short, as all American Exchanges have schedules of commissions fixed on the basis of yielding a fair compensation for services rendered, it can readily be determined whether the result has been detrimental to commerce. All must concede that, instead, trade has been and is being benefited. There is no subject upon which the universality of intelligent opinion is so wide-spread and pronounced; and this conclusion is entitled to the very greatest conceivable weight and consideration.

Interstate Com. Commission v. B. & O. R. Co., 145 U. S., 263, 279;

Hoover v. Penna. R. Co., 156 Pa. St., 220, 233, 243.

AUTHORITATIVE CONCLUSIONS CONCERNING EXCHANGES.

The citations and quotations already made on this subject (Brief, pp. 81, 82; 98–110; 114–121; 126–132, *et seq.*) are strongly corroborated by authorities which have more recently come under notice:

Nearly forty years ago, a discriminating contributor to the National Social Science Association of Great Britain,—a body which then carried upon its rolls the greatest names and profoundest learning of the Kingdom —reviewed the subject of Chambers of Commerce. After pointing out that at that period there were 25 of these bodies in England, 10 in Scotland, and 5 in Ireland, the Edinburgh Chamber having been instituted in 1786, Mr. Darlington summarized the general purposes of their organization to be "to promote measures calculated to *benefit and protect* the mercantile and trading interests of their members and of the district in which the society is formed, * * and of attaining such commercial advantages as the exertions of individuals may be less adequate to accomplish," (the very consideration which demonstrates that such an association is clearly not within the rule of illegality, 80 Fed. Rep., at 847). A review of their operations induced this conclusion: "One feels astonished at *the vast amount of good* which has been accomplished through their instrumentality, and perplexed to know *how it could have been possible* to watch over the trading interests of our hives of industry without the intervention of Chambers of Commerce. * * Few persons would now be found to dispute *the necessity* for them."

Transactions, National Social Science Asso., (London, 1858), p. 151.

The views thus expressed in England forty years ago are strongly confirmed and reinforced in a recently published history, under the editorship of Mr. Depew, entitled,

"ONE HUNDRED YEARS OF AMERICAN COMMERCE."

The chapter devoted specially to Commercial Organizations (pp. 50-54) bears the signature of Mr. Alexander E. Orr, whose great experience in mercantile affairs and long and useful service as President of the New York Chamber of Commerce, entitle his conclusions to be accepted as those of one who is endowed with the quality of authority. The preamble of the association under whose auspices this Court held its first session (Brief, p. 81), and which came into being under a royal charter, recited that "Mercantile societies have been found *very useful* in trading cities for *promoting and encouraging commerce, supporting industry*, adjusting disputes relative to trade and navigation, and providing such laws and regulations as may be found necessary *for the benefit of trade in general*" (50). The royal grant was promptly confirmed by the legislature of New York in 1784, and the body has had upon its rolls the names of public officers of the highest rank, including Presidents of the United States (51). Some of the more important patriotic services rendered by that organization, in connection with the many trading Exchanges of which it was the forerunner, are set forth (51, 52), and the conclusion drawn that to complete the sketch would be "largely *to portray the political, commercial, industrial, and financial development of the country* (52).

Succeeding the war of 1812, Exchanges were organized in various cities, and these "have done much towards *developing the industries, trade, and traffic* of their localities, as well as taking more or less active part in *promoting the general commercial welfare of the whole country*. But the commercial associations which are *the*

most numerous, and withal the strongest, are those founded by people who deal *in like things* in towns or cities, which are to some extent centers of particular callings, such as cotton in New Orleans, etc." (53), to which may well be added "and grain and live-stock at Chicago, Kansas City, and St. Louis." Illustrative of this class, the Chicago Board of Trade is favorably referred to (53). "To *facilitate the operation* of the great concentration of business (at the city of New York), it was found expedient to organize separate Exchanges and Boards of Trade, which, as time has passed, have grown into large proportions" (53). Referring to the more prominent of the *seventy* bodies of this nature in that city, these summarized statements are made: The New York Produce Exchange "possesses the finest Exchange building in the United States, and its business and influence are proportionally great in the line of its specialties. The Stock Exchange * * has given *great impetus to the development* of transportation in this country. The Cotton Exchange * * buys and sells more cotton for future delivery than any other Cotton Exchange either *at home or abroad.* * * The Coffee Exchange has lately grown into very great prominence, and now *surpasses* in the volume of its business that of Havre, France, which is believed to be *the largest in Europe.* The Mercantile Exchange * * now aggregates an enormous business" (53, 54).

The reviews of the respective rules and operations of these New York bodies in the principal Brief (pp. 81, 82; 140-150; 170-171; 172-176; 182-184), demonstrate that to affirm the order here appealed from will be to administer a death-blow to their continued existence.

The contention that such a result is demanded in order that *trade may not continue to be restrained*, and that the public welfare may be freed from the *injury* now being done by the existence and operations of these institutions, is completely overthrown by the conclu-

sions expressed in the final paragraph of Mr. Orr's contribution:

"Thus it will be seen that, starting with but four commercial organizations, of the character and scope outlined, at the beginning of the nineteenth century, their number at its close will have increased five-hundred fold. **What they have accomplished for the people of this country is simply incalculable.** *The record is found in our extensive manufacturing interests; in the products of the soil, forests, and mines; in our enormous interstate commerce; in our foreign trade; in our circulating medium and monetary institutions; and, finally* **in the unprecedented increase in National wealth, prosperity and development."**

"One Hundred Years of American Commerce," Vol. 1, p. 54.

Similar views were expressed by General Horace Porter, in reviewing the Commerce of the city of New York (61, 62), and are recognized, with more or less amplification, throughout the book. The views of leaders in practically every department of our commerce are there collated, and not a single hint or suggestion is to be found which lends support to the contentions of the Government in the present case. Considering the circumstances, this silence is extraordinarily significant.

In dealing with the subject of "Wall Street," Mr. John P. Townsend, President of the Bowery Savings Bank, (probably the largest institution of its kind on American soil), incidentally referred to the circumstances which led to the formation of the Merchants' Exchange of 1795, (p. 68), and noted that "brokers who bought and sold for others on commission could (then) be found as easily as at the present time" (68-69). Mr. Townsend corroborates the account of the origin of the New York Stock Exchange by means of the informal agreement of 1792, which is set out on p. 146 of the principal Brief, and reprinted

in his article (69). He concludes his sketch of the history of that body with these statements: "Its functions are as vital to the *development and prosperity of the country* as to the money market. It affords a *constant and regular market* for the securities of the great corporations and indexes their value in quotations of *actual* sales and bids. * * The door would be open *to manipulation and fraud almost unlimited were the safeguards it affords to be removed.* The Stock Exchange, it is true, cannot control *the relation of value to prices*, but *it can and does secure a fair, free and absolutely open market*, where the dealings are matters of record and public knowledge. * * In the exercise of these functions the Stock Exchange has come to stand as *the great regulator of the market for securities*, and its transactions, fully reported, serve as the standard by which values are established. In the internal economy of the Stock Exchange *every method best adapted to conserve the ends of straightforward and legitimate business investment has been adopted.* * * The publicity the Stock Exchange thus allows to all transactions, the centralization it affords to the great interests of the country, and the *regulations it imposes upon all operations*, are among *the greatest advantages* it confers" (70, 71).

So, Mr. John W. Nix, a leading merchant in that branch of commerce, in treating of the Fruit Trade, said: "The many opportunities that *irresponsible dealings*, in consequence (of the perishable nature of the article), offer *for fraud*, have led the trade of New York, and every other great center as well, to establish *certain safeguards* and to seek in organization to combine *the better elements against questionable methods.* Among the larger and better known of these organizations are the New York Fruit Exchange, operating on the same principle as the other great Exchanges; the Fruit Buyers' Union, which aims to regulate the green-fruit import and auction business so as to render corrupt prac-

tices impossible; and the National League of Commission Merchants, the aim of which is to secure *uniformity and integrity of method* in the commission business" (vol. 2, p. 606).

Incidentally, it is to be noticed, in view of the effort below to sneeringly belittle the value of the quotation concerning Clearing Houses, which is made on page 131 of the Brief, by reason of its appearance in a current magazine, that in "One Hundred Years of American Commerce," Ex-Governor Morton and Mr. Townsend make precisely the same statements (pp. 6, 72).

A brief reference to convenient data, not already reviewed, will demonstrate how far Mr. Orr's conclusions have application to the situation and association under consideration in the present instance, and to what extent the rules and operations of the defendant Exchange have *restrained trade* and *obstructed commercial development* in the field over which the influence of that body has extended.

In Cotting v. Kansas City Stock Yards Co., 82 Fed. Rep., 839, 841, the total receipts of live stock at the Kansas City yards for 1896 were judicially found to have reached the enormous aggregate of 5,471,246 head!

The record in the pending case (p. 127) shows that in 1872 (the first full year during which the yards were open for business), the total receipts were 350,160 head, and that in 1886, the year prior to the formal organization of the Exchange and during a period of great general prosperity, the receipts were 2,961,303 head. This shows an *increase* of fully *eighty* per cent. in number under the operations of the Exchange, (1887-1896) in spite of the intervening years of business depression and of the establishment of competing markets at other points throughout the West.

The record (p. 127) also shows these facts with

reference to the *value* of the shipments during the years above referred to:

In 1872	$ 9,175,071.
" 1886	35,340,150.
" 1896	103,402,298.

So that since the present Exchange was formed in 1887, the shipments to Kansas City have not only nearly doubled *in number*, but *the proceeds realized have increased nearly three-fold!* This, too, when in respect of the population of that city, there has been a merely nominal, if any, increase during the same period.

The Cotting case also discloses that:

a. Of the live-stock sold at the Kansas City Stock Yards in 1896, more than *seventy* per cent. originated in Kansas or Missouri, and nearly *eleven* per cent. in the Territories; and,

b. Although about *forty* per cent. of the total receipts had been shipped with the privilege of stopping over at Kansas City and of testing the market there, the defendant Exchange so affected trade that *ninety* per cent. of these forty per cent. were in fact sold there, and not reshipped (82 Fed. Rep., at 841, 842).

In 1896 the Stock Yards Company also issued, for *general circulation* and information, an illustrated report and bulletin, embodying the data already referred to and other matters deemed to be of interest to patrons.

In the Cotting case, 82 Fed. Rep., at 848, it was found that the present Live Stock Exchange Building, which, it will be remembered, belongs to the Stock Yards Company, cost $250,000. A representation of it appears on page 2 of that Company's 1896 Illustrated Bulletin. A comparison with the buildings used for Exchange purposes from 1871 to 1876 (p. 12), and in 1887, when the present association (which was, however, informally brought into existence in 1876) was permanently organized (p. 10), will demonstrate an instructive object-lesson. So, too, light is shed upon the issue here involved, by comparing the

stock-yards of 1871 (p. 18) with those of 1896 (pp. 16, 17) and the adjuncts shown on pp. 20, 22, 24 and 14.

That pamphlet was manifestly prepared without reference to the litigation to which that Company became a party by reason of the subsequently enacted Kansas Statute, considered in the Cotting case, and certainly with no intent to influence the present suit. It is to be noted that the data bearing upon the last week of December were "estimated" (p. 13), and that the present bill was not filed until the last day of that month (Record, 14). Hence, what is there said concerning the Exchange possesses, at least, the attribute of *disinterestedness*. It is, however, entitled to even greater consideration because the interest of the Stock Yards Company being to *attract* the very largest possible number of consignments and purchasers, it would be the *very first* to know whether the Exchange was *restraining* trade or in any way *obstructing* the flow of commerce, and no doubt be loudest in its objections to that body and in its demands for its speedy dissolution. As the rentals collected from the members of the Exchange constitute but an insignificant part of the annual gross earnings of the Company,—which, in 1896, aggregated $1,023,870.20 (82 Fed. Rep., at 848),—any suggestion that a desire to retain tenants dominated the Annual Report under consideration, is at once dispelled; especially, as the theory of the present suit is that a dissolution of the Exchange would increase the number of tenants and thereby augment the income of the landlord from that source.

The conclusions expressed by this Company in respect of the matters under consideration here, are, consequently, entitled to careful consideration:

If shippers "wish to save the commission charge, there are *no restrictions* and *no expense* for selling their own stock on the market—the popular belief to the contrary notwithstanding" (25). * * *

"The Kansas City Live Stock Exchange is an as-

sociation organized, not for the purpose of pecuniary profit or gain, as is generally supposed, but *to promote and protect all interests* connected with the buying and selling of live stock at this market. Membership in it is not compulsory, but represents a privilege, the basis of which is to enforce amongst its members *safe*, *legitimate*, and *high moral principles* in the transaction of business. It would be preposterous to think of transacting the immense volume of business at this market at this time without *some common understanding*, *some systematized plan*, *so plain that all can understand*, *so just as to commend it to all engaged. The necessity of it was made plain in the early history of the business.*" An account is then given of the difficulties encountered and of some of the wrongs practised in the absence of the Exchange, which concludes thus: "Last, but not least, the farmer, feeder, and shipper were entirely *at the mercy of unscrupulous and unsystematized business methods.* It was plain that he needed the protection of knowing what *it would cost him* to have his stock fed, watered, weighed, and sold or bought. He needed honest weighing and straight, legitimate sales. He required not only speedy and correct returns, but to be sure of his proceeds. *This chaotic condition of evils and abuses*, from which *all interested suffered* to a more or less degree, *made the necessity of an organized body such as the Kansas City Live Stock Exchange.* In the formation of its rules and bylaws, all *the stated evils have been cured*, and the vast interests of this market under its control are transacted in such a *just and legitimate manner as to satisfy all vitally concerned.* * * It is a business association of all interests represented, with an eye-single to systematizing the business at these yards on a basis of just and high moral principles" (25–27). * *

"With the development of the live stock interests of the West has arisen *the absolute necessity* of reliable

and honorable middlemen, or commission firms." * * All the recited requisite and desirable qualifications "our Kansas City live stock commission merchants have, and *shippers generally agree that their services are worth many times what they cost*" (27–29).

Of the 300 members of the Exchange, 192 were engaged in business as commission merchants, and the 90 firms (allowed, under section 10 of Rule IX., to employ *three solicitors each*) voluntarily contented themselves with 82 such agents (21).

This general characterization of the defending Exchange is strongly supported by the detailed report of the Royal Commission of 1877–8, which, since the preparation of the principal Brief, (on pp. 107, 108 of which the general conclusions of that eminent committee are set forth), has been found to be printed in full in 13 Law Journal.

In that detailed report, these additional statements and recommendations were made, the page references being to said 13 Law Journal:

The Exchange freely granted *full access* to every fact and document and to all information in its possession, and rendered *every assistance possible* in aid of the investigation in hand (541).

"It is practically *the only market in London* for the buying and selling of stock and shares" (542).

The right of entry is *strictly confined* to its members and their authorized clerks (541, 542).

"Out of the *millions* of contracts made on the Exchange, such a thing is *hardly known* as a *dispute* as to the existence of a contract or its terms" (552).

"The parties are enabled to count upon a *reasonable speed and certainty* in the transaction of business; and the vast amount of business done secures to those who deal there *as small a difference* between the buying and selling price as can be obtained in any other market" (553).

It is to the interest of the public that admission to

membership therein should be made *more difficult* and *fewer persons* accorded the privileges thereof. It is essential to the success of such an organization that it should be "*close*." By rendering admission too easy, there is danger of misleading the public into supposing that given persons are entitled to the *great credit* impliedly guaranteed by the action of the Exchange in electing them as members (607).

The rules of the Exchange have been framed with much care, and embody the result of long experience and vigilant attention on the part of persons best posted, and most deeply concerned in upholding the *good name of the market* and in protecting *all interests* (616).

Any attempt to overrule the conclusions thus codified "would be *detrimental to the honest and efficient conduct of business*" (616).

It is important to the public that all reputable non-member brokers should be brought under the control of the rules and committees of the Exchange (617).

"Such a body can hardly be interfered with by Parliament without destroying that *freedom of self-government* which *is the only life and soul of business*" (619), a paragraph quoted from a Parliamentary committee on Foreign Loans, 1875.

The Exchange was not formed as the result of *voluntary action*, but its organization was *forced* by circumstances of a mercantile nature over which the members had but little control, *i. e.*, such a body was *essentially necessary to that orderly conduct of trade by which alone it can flourish and be carried on* (619).

Similar considerations induced the judicial conclusions announced in a case decided as recently as October 22, 1897. Although decided at *nisi prius*, the large experience, especially in this class of litigation, and the great learning of Judge TULEY, entitle his rulings to the most respectful consideration. There, the same firm of Greer, Mills & Co., which figures so prominently in this record, appears to have been fined by the Chicago

Live Stock Exchange for disposing of *diseased cattle* contrary to the rules of that body. They applied for an injunction; and it appears from the certified record of that hearing that when it was offered to be shown that the volume of the sales made by Greer, Mills & Co. per annum, was from ten to twelve million dollars, and that if they were expelled for non-payment of the fine in question, they would sustain irreparable injury, because the rules of the Exchange *forbade its members to deal with non-members or with suspended or expelled members*, the learned judge, instead of promptly pronouncing such a rule to be criminal and void, said: "There is no order expelling them. * * They can pay the fine and not be expelled." He accordingly excluded the offer, and in upholding the further rule that a member should be responsible for the acts of his servants, and declaring that such member is alike amenable to discipline whether his action be intentional or spring from carelessness, Judge TULEY also said: "It may be absolutely necessary for the purpose of the organization to * * have *an iron rule* and hold its members *strictly to it*. * * That is *the only safe rule* for the Board to adopt. * * *The existence of the Exchange demands that kind of a rule*."

Greer, Mills & Co. v. Chicago Live Stock Exchange, Cook County, Ill., Cir. Ct., Oct. Term, 1897.

The force of what has been said of the London Stock Exchange has been sought to be escaped by the remark that the rules of that body do not prescribe a schedule of commissions. It is to be noted, however, that the attacks made upon Exchanges by the present suit are not limited to a denial of the right to agree upon such a schedule. Indeed, the circuit court deemed this phase of the case to be of so little importance, or to be possessed of such slight merit, that it was not included in the matters condemned in the opinion delivered, nor alluded to as a reason for the

conclusions announced (Record, 267–270). The lawfulness of these bodies is here questioned upon the additional grounds that they are "monopolies" whose existence is fraught with injury to the public, and that they constitute conspiracies to restrain trade, in that they refuse to grant access, or the other privileges of membership, to competing non-members who conduct their business in violation of the rules, and to suspended or expelled members, but, instead, inaugurate a "boycott" by refusing to have business intercourse with them. In these respects, the London Stock Exchange is quite as great and hardened an offender as are the other Exchanges of the world.

It is an entire error, however, to say that the absence, from the rules of that body, of a provision concerning commissions, is because of the existence of prohibitory legislation on the subject. And as "in most of the local Stock Exchanges (in that country) the amount of a broker's commission *is regulated by a fixed tariff*" (Melsheimer, Stock Exchange, 60), recoveries for which have been many times sustained (note 1, p. 61), the absence of such a schedule at London cannot be attributed, in the slightest degree, to any apprehension or doubt as to the *right to thus agree*.

The English statute referred to (10 Anne, c. 19, §12) was enacted in 1712—nearly *ninety years prior* to the organization of the London Stock Exchange—and is a part and parcel of the Parliamentary regulation of brokers which is found in the earlier English statutes.

The percentages there prescribed are *maximum rates*, and apply only to certain enumerated classes of securities dealt in on the floor of that body. The existence of such a statute may lend force to the suggestion that such rates can be *regulated* by legislation, (at least in England and in the absence of constitutional guaranties), but is wholly irrelevant to the question whether a schedule of *minimum* commissions fixed by an Exchange

evidences a combination in restraint of trade. And if there were any connection between that legislation and the methods of the members of the London Exchange, the statute referred to would prove, not that it was improper or unlawful *to agree on such a schedule*, and much less that such bodies should be shorn of one of their *most efficient functions to promote the good of trade*, but rather that full protection was secured against the possibility of extortion, or other injury to the public, by the enactment of a table of maximum charges.

The statute of Anne, and the other regulations on the subject of brokers generally, Parliamentary and municipal, (some of which are considered on pp. 101, 102, of the foregoing Brief), do, however, demonstrate that *before Exchanges were established and their powers fully recognized*, there was a constant and pressing occasion for *governmental regulation* in the premises, to the end that abuses might be prevented, fair dealing insured, reasonable rates prescribed, and the orderly conduct of the occupation provided for. The formulation and enforcement of rules to *precisely the same ends*, and for *identically the same reasons*, have been and are *the chief aims of Exchanges*. It has been many times judicially declared that these bodies, by means of their rules, committees, and machinery, are best fitted to discharge this delicate and complex task, and stand equipped with a disciplinary power to secure the commendable end in view which is far more effectual—and of correspondingly greater benefit to the public—than can be accomplished by the processes of the criminal courts (Brief, 100, 107).

Hence, it is of striking force that *since Exchanges have been organized* and have assumed the supervision of the item of broker's commissions, and provided regulations for the orderly conduct of the occupation, there has been *no further resort to such legislation* in any of the civilized countries of the world. And it is particularly notable,—in view of the marked disposition

on the part of American legislatures (especially during the past 30 years) to regulate rates and charges generally,—that no statute has been passed declaring rates of commission, or for storage, inspection, or otherwise, fixed by a typical commercial Exchange, to be unjust or unreasonable. This proves not only that Exchanges are exceptionally well-qualified to regulate the matter, but that they have shown an appreciation of the confidence reposed in them by fixing rates, and providing regulations in other respects, which are universally conceded to be fair to all concerned. Self-interest is doubtless also a factor in this result, especially in these days of ready and rapid communication and transportation, by means of which all parts of this country and of the commercial world are brought into convenient trade relations to each other (a result to which Exchanges have largely contributed, Dos Passos, Stock Exchanges, 10), and in times when the contest for commercial supremacy between different cities and nations is a marked feature of contemporary history.

An explanation of the silence of the rules of the London Stock Exchange on the subject of commissions readily occurs when it is remembered that the business done by its members is of the most cosmopolitan and varied character; and that a great majority of it is so classified that dealings therein are confined to respective circles of brokers and dealers. This has doubtless resulted from the fact that such dealings were thus carried on for centuries before that Exchange was formed. It is no easy task (perhaps, a most difficult one in that country, of all others) to eradicate or overturn a commercial custom so long established and so deeply rooted. As a consequence of this course of dealing, certain securities are handled only by a given coterie of brokers and bankers. For each of these sub-divisions, however, *usage* has fixed a rate of commission equally as well-known and quite as hon-

orably adhered to in practice by all *reputable* brokers, as if embodied in a formal rule (Melsheimer, Stock Exchange, 60). As the members of that body are required to be re-elected *annually*, the remedy for conduct deemed to be injurious to the organization is most potent and easy of application. A refusal to re-elect is the equivalent of a suspension or expulsion elsewhere. These conditions and customs do not exist in this country, where it is the universal opinion that trade is more benefited by providing such a schedule, and that Exchanges are better enabled to accomplish their useful purposes by making membership therein a privilege to continue so long as the conditions upon which the same is granted—compliance with the rules of the body—are observed by the holder.

The practical operation of the absence of such a schedule from the rules of the London body is graphically delineated in a review of that organization from the pen of Mr. Henry May in the Fortnightly Review for 1885. The general tone of his paper shows that author to be anything but a friendly critic. Indeed, the judicial conclusions upon the subject of time bargains and the like, noted in the principal Brief (pp. 105-112; 115; 268), demonstrate that some of his deductions are unjustifiably severe. Nevertheless, he was inexorably constrained, and frank enough, to concede that "the London Stock Exchange is *the natural outcome of public requirements*. As an organized machinery for dealing in securities it is *a public necessity*. * * Its ordinances and customs are *undoubtedly framed upon* the same *principles of honor, integrity, and fair dealing* which actuate every honest and straightforward man."

The result of a want of absolute uniformity in the matter of commissions is thus sketched:

"The business classification of the members is not very difficult:

1. "Among brokers there is the old-fashioned investment broker—a man who is regarded by his clients as the

very incarnation of trustworthiness, wisdom, and affectionate integrity, a man to whom his 'family connection' is as much a source of pride and profit as is that of the family doctor, lawyer or parson; a man *who invariably charges a full commission* and abhors speculation, and whose clients wait upon him at his office.

2. "Then there is the leading *peripatetic broker*, an active man of business capital and position, who is rarely to be found in his office, but who chiefly spends his time in running to and from the Stock Exchange, canvassing his clients—for the most part financiers, foreign bankers, and merchants—in the streets, courts, and alleys between St. Swithin's Lane and Bishopgate Street, where they do most abound. * *

3. "Next, there is the '*touting*' *broker*, who earns a somewhat precarious living by speculating and the 'tape,' who assiduously reports or telegraphs (*probably prepaid*) every 'sixteenth' change of price, keeps a small army of 'touts' (*quasi solicitors*) *on half commission* to scoop in speculative orders, and *who knows not the meaning of real investment.*

4. "Lastly, there is the *quack broker* who waxes fat *on purely nominal brokerages*, and keeps a 'legitimate' gambling saloon, as distinguished from a mere 'bucket shop', who piles up money *by* '*besting*' *his clients*, and who is prolific in 'tips' which somehow generally fail to 'come off.'

Other intermediate varieties of brokers will no doubt suggest themselves to the reader."

"The London Stock Exchange", 44 Fortnightly Review, 577, 578, 579, 580.

And so it will no doubt suggest itself to the judicial mind that the American system of permitting none but brokers belonging to Mr. May's class one—"the very incarnation of trustworthiness, wisdom, and affectionate integrity"—to become or remain members of reputable Exchanges is *far more beneficial to trade* and to the interests of the public, than to declare that the Act of

Congress intended that what is said under classes three and four, should thenceforth describe the typical American broker, in whole or in part.

It is as monstrous to say that trade will be promoted by *encouraging* "touting" or "quack" brokers and their methods, as it is to conclude that an organization designed to *discourage* their success and to *protect the public* from their practices, is a combination to *restrain* trade, or designed to *injure* the commercial interests of our land!

If, however, the Act of Congress should be construed to prohibit every contract concerning or affecting trade (be it ever so beneficial and free from any element of actual or injurious restraint), or to deny to persons engaged in a merely private occupation the right to agree at what rate of wages or rates of commission they are willing to serve those who may seek to employ them, or to determine whom they will refuse to serve and the reasons therefor, in either event, the Act will be made violative of the Fifth Amendment to the Federal Constitution, in that it will, *as thus construed*, operate to deprive the contracting parties of liberty and property without due process of law. "Every unnecessary restraint on the natural liberty of mankind (it has been well said) is a degree of *tyranny* which no wise legislature will inflict."

And, of course, the Act is to be construed, if possible, so as to avoid an infraction of the constitution, (Grenada County v. Brogden, 112 U. S., 261, 269), a rule of special force when the personal rights of an American citizen are involved.

Boyd v. United States, 116, U. S., 616, 635;
Monongahela Nav. Co. v. United States, 148 U. S., 312, 325;
Gulf etc. Ry. Co. v. Ellis, 165 U. S., 150, 159, 160.

In this connection, it is proper to consider, whether,

VIII.

If each and every Contract Concerning or Affecting Trade or the Manner of Conducting it, is Construed to be Ppohibited by the Act of Congress, can the Statute be Upheld in view of the Fifth Amendment to the Federal Constitution?

The Act of July 2, 1890, can only be sustained as

an exercise of the power conferred upon the Congress by section 8 of article I. of the Constitution "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

There is no grant to Congress of a *general police power* such as *inheres* in the Legislatures of the several States. Congressional jurisdiction in the premises can only be upheld as included in the power *to regulate commerce*. While this power is doubtless a broad one, yet it cannot be said to be absolute. In the exercise of it, Congress cannot infringe upon rights which other clauses of the Constitution declared to be inalienable and unassailable. Under guise of regulating commerce, Congress cannot pass an *ex post facto* law or a bill of attainder, nor condemn a man unheard, nor take private property for public use without compensation, nor deprive a person of life, liberty or property without due process of law.

The Fifth Amendment "is a series of negations and of denials of right or power to the government. (325). * * Like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by that instrument, and among them is that of the Fifth Amendment" (326).

Monongahela Nav. Co. v. United States, 148 U. S., 312.

"A mere act of Congress cannot amend the Constitution. * * Legislation cannot abridge a constitutional privilege."

Counselman v. Hitchcock, 142 U. S., 547, 565, 585.

Of course, it is not denied that Congress may constitutionally protect commerce from such interferences as are outlined in *Ex parte* Debs, 158 U. S., 564, nor that in regulating commerce Congress can forbid contracts which *actually* have an *injurious effect* thereon. Here, however, there is no violent interference

with transportation or any other branch of commerce. Neither the Exchange nor its constituent members are seeking to injure or impede commerce. On the contrary, their purpose is that commerce shall expand in volume and that the benefits thereof shall be made so plain and become so widely known that the purchase, sale and transportation of live-stock will constantly and continuously increase.

No one is sought to be "compelled" (in a legal sense) to employ a commission merchant. The sole scope of the rule on the subject of commissions (IX.) is, that, *if* any one should desire to employ a member, the latter's compensation is to be fixed in accordance with the usual and reasonable rates there scheduled. This does not restrain commerce, as such, nor does it "coerce" a principal into employing such member. It merely operates as an honorary agreement on the part of a member concerning his compensation. Undoubtedly, a member could, of his own motion, refuse to serve for less than the named commission. Equally clear would be the right of a partnership or of a corporation to decline to work for less because the constating articles or by-laws so provided. (Planters' Compress Co. v. Ireys, 16 South. Rep., 386). And upon the same principle, the usage may be embodied into a rule of an Exchange.

The non-trading rule (XVI.), in effect, confines the privileges of the Exchange to members in good standing, a provision which is not only reasonable but imperatively essential to the successful maintenance of the organization (McQuillen v. Real Estate Exchange, 39 N. Y. St. Rep., 426; 15 N. Y. Supp., 206). When the members of such a body operate in a closed room, as in case of a Stock or Grain Exchange, the same end is accomplished by prohibiting dealings elsewhere and by denying access to non-members.

Board of Trade v. French, 61 Ill. App., 349;

Speight v. Gaunt, 22 Ch. Div., 727, 742, 745, 754.

The occupation of the parties is essentially private. Individually or collectively, they have the right to serve whom they please or to refuse to serve at their own uncontrollable election. (Kirkman v. Shawcross, 6 T. R., 14).

The Definition of "Liberty."

The precise point is, whether they can constitutionally be denied the right to prescribe the wages for which they are willing to serve, by agreement among themselves, especially when those wages are the usual ones for such services, and, therefore, not unreasonable.

That the rights of the defendants to contract in this respect constitute a portion of the "liberty" which the Constitution protects is now established.

"The liberty mentioned in the Constitution means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all legal ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose *to enter into all contracts* which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Allgeyer v. Louisiana, 165 U. S., 578, 589;
Matter of Jacobs, 98 N. Y., 98;
People v. Gillson, 109 N. Y., 389;
State v. Goodwill, 33 W. Va., 179;
Comm. v. Perry, 155 Mass., 117;
Leep v. St. Louis etc. Ry. Co., 58 Ark., 407;
Low v. Rees Printing Co., 41 Neb., 127;
Ritchie v. People, 155 Ill., 98;
Palmer v. Tingle, 45 N. E. Rep., 313 (Ohio, 1896).

So, too, the business which the defendants have built up and the right to use their labor to advance their own condition in life, constitute "property" within the protection of the constitution.

Yick Wo v. Hopkins, 118 U. S., 356;
Kuhn v. Common Council, 70 Mich., 534, 537;
People v. Otis, 90 N. Y., 48, 52.

The inquiry is, therefore, narrowed to whether the Act of Congress of July 2, 1890, if construed to inhibit any and all agreements between persons, engaged in a merely private occupation, fixing the compensation for which alone they are willing to work, is violative of constitutional guaranties? Stated in another way, can Congress compel such persons to labor for an employer whose service they are unwilling to enter and at wages which are not satisfactory to them?

The two questions involve identically the same considerations.

Here, any one desiring to buy or sell live stock at the Kansas City Stock Yards, is free to act in his own behalf or to employ a commission merchant to act for him. Clearly, Congress could not compel the owner of live stock or an intending purchaser to deal only at such Stock Yards, nor prohibit him from employing a broker if he so desired, nor, on the other hand, declare it an offense for him to buy or sell without first making such employment. Nor can it enact that such a broker, at least so long as his occupation is merely private, must serve all who come and at prices he is not willing to accept, even though the prices he asks stand fixed by partnership articles or corporate by-laws. In the forceful language of Mr. Justice HARLAN such a statute "would be an invasion of one's *natural liberty* by compelling him to work for or to remain in the personal service of another." (Arthur v. Oakes, 63 Fed. Rep., 310, 317, 318). And, most certainly, a court cannot adjudge such a duty in the absence of a valid statute.

Does a different rule obtain because the

parties have chosen to exercise the very same "natural liberty" by forming an Exchange, Trades Union, or the like? It is to be at all times remembered that the defendants are not engaged in selling or fixing the price of a commodity or article of prime necessity, within the meaning of the cases on the subject. It so happens that their services consist, in part, *in negotiating a sale*, but this is only in the *exercise of their occupation*, and not as owners or purchasers. (Union Stock Yards Bank v. Gillespie, 137 U. S., 411, 415). When all has been said, they are exercising an occupation, performing labor, for a commission, namely, wages. "The rules of the Exchange are merely machinery for bringing the two parties (principals) together." (Bowring v. Shepherd, L. R., 6 Q. B., at 327).

Nor does the inquiry under consideration involve a matter of resorting to *unlawful means*. The precise point is, whether persons engaged in a given private occupation can agree upon a schedule of wages, conceded to be the usual ones prevailing throughout the United States, and to be no more than a fair compensation, without any purpose to resort to any means to exact payment of the wages so fixed, except only to refuse to serve principals who are unwilling to pay them.

It will not do to say that the skill of the defendants is so great that all are anxious to avail themselves of it, or that the rules of their Exchange afford facilities so perfect, and so great a protection against injury, that buyers and sellers of live stock concur in desiring to reap the benefits of a transaction thereunder. It cannot be made a crime to possess or develop such a degree of skill or to provide facilities or guaranties of the character indicated. On the contrary, as "it is the policy of the law, for the advantage of the public, *to encourage and protect commercial enterprise*," it is a necessary corollary that "if a man establishes a business and makes it valuable, by his skill and attention, the good-

will of that business is recognized *by the law as property*," and that a contract to preserve or further that good-will cannot be said to restrain trade or to be injurious to the public.

Peabody v. Norfolk, 98 Mass., 452, 457;
Salomon v. Hertz, 40 N. J. Eq., 400, 402;
Thum v. Tloczynski, 72 N. W. Rep., 140, 144, (Mich., 1897);
Washburn v. National Wall-Paper Co., 81 Fed. Rep., 17, (C. C. A.).

The question, therefore, recurs whether a mere agreement as to a schedule of commissions, voluntarily made and adhered to, by persons engaged in a private occupation, can be constitutionally annulled.

Act of Congress Authorizing Trades Unions to be Incorporated.

As to Trades Unions, Congress has expressly authorized their incorporation "for the purpose of the regulation of their *wages and their hours and conditions of labor*, and the protection of their *individual* rights in the prosecution of their trade or trades," with power "to make and establish such constitution, rules and by-laws as it may deem proper, etc." (Act July 29, 1886, 24 Stat. L., 86). Of this statute, Mr. Justice Harlan said that its "objects are *most praiseworthy* and should be sustained by the courts whenever their power to that end is properly invoked." (Arthur v. Oakes, 63 Fed. Rep., 310, 324, 325).

The contention of the complainants will not only work a repeal of the Act of 1886 by force of the Act of 1890, but also transform the corporations organized under the former into criminal conspiracies!

"Due Process of Law."

The power to thus abridge the liberty and property of the citizen does not exist unless it is accomplished by

"due process of law." It is fully recognized that this phrase is not susceptible of a definition so comprehensive as to cover every conceivable case. But the authorities clearly disclose the fundamental tests to be applied in determining the present instance.

Primarily, it is established, and it is a self-evident proposition, that a mere legislative declaration is not, *per se*, due process of law; otherwise, the constitutional guaranty would be a mere form. The provision is intended to limit legislative power as well as that of other governmental departments.

Murray's Lessee v. Hoboken Land Co., 18 How., 272, 276, 277.

"Can Congress make anything due process of law, which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition is of no avail, or has no application, where the invasion of private rights is effected under the form of legislation."

Davidson v. New Orleans, 96 U. S., 97, 102, 107.

At a comparatively early day it was said to be the accepted and settled meaning of the provisions in question "that they were intended to secure the individual from the *arbitrary exercise* of the powers of government, unrestrained by the established principles of private right and distributive justice."

Bank of Columbia v. Okey, 4 Wheat., 235, 244.

This has been enforced by a series of well-considered cases:

Hurtado v. California, 110 U. S., 516, 532, 535, 536;

Hagar v. Reclamation District, 111 U. S., 701, 708;

Yick Wo. v. Hopkins, 118 U. S., 356, 370.

In the most recent discussion of the subject it was ruled that "due process of law in the Fifth Amendment refers to that law of the land which derives its authority from the legislative powers conferred on Congress by

the Constitution of the United States, *exercised within the limits therein prescribed and interpreted according to the principles of the common law.* Undoubtedly, the amendment forbids any *arbitrary* deprivation of life, liberty or property."

In re Kemmler, 136 U. S., 436, 488.

Among the rights secured by these rules is that of following a lawful calling, subject, of course, to proper local police regulations, but not subject to be arbitrarily and wholly denied.

Dent v. West Virginia, 129 U. S., 114, 121, 122, 124;

People v. Gillson, 109 N. Y., 389;

Munhall v. Pennsylvania R. Co., 92 Pa. St., 150, 156.

These propositions are not shorn of efficacy because the attempt to abridge the rights of a citizen is undertaken to be made under a so-called Anti-Trust statute.

In re Grice, 79 Fed. Rep., 627, 639-645.

Consequently, an attempted interference with the rights of citizens,—with their freedom to contract and to conduct their lawful business as merchants have done for centuries,—must rest upon a basis of some substantial or justifiable reason. To say that at the mere whim of Congress they must surrender their rights in that behalf is to call a halt in the "victorious progress of the race" and to degrade American freemen to the position of English laborers in the days of Edward III., which a thoughtful writer has declared to have been the essence of *serfdom!* Of the legislation which proceeded upon this basis, the same authority said: "I should not myself describe it as a system specially adapted and designed *to protect freedom of trade.*"

3 Steph. Hist. Crim. Law, p. 209.

It is to be recalled that the Act, construed as outlined, does not merely operate to *regulate* the occupation of commission merchants or to laborers generally, but, leaving it to occupy its status as a merely private occu-

pation, it denies the right to carry it on, under the rules of an Exchange or other association—constituting a voluntary agreement on the part of its members, even though those rules be fair in form, and involve no injury to the public, and even though the wages at which services are offered to the public for their acceptance or rejection, are not challenged as unjust or oppressive. In the American courts, at least, it has been established by the great weight of authority that the right to thus agree is a fundamental and inalienable one, as more fully shown by the cases upon the subject noticed at a subsequent page. Some of them are:

Freeman's Note, 28 Am. Dec., 508;
Master Stevedores Asso. v. Walsh, 2 Daly, 1, 5, 7–12;
Ladd v. Southern Cotton Press Co., 53 Tex., 172, 188, 193;
Carew v. Rutherford, 106 Mass., 1, 14;
Queen Ins. Co. v. State, 86 Tex., 250, 265, 269–275;
Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St., 173, 188.

"There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than *the sacred right of labor*."

Live Stock Assn. v. Crescent City Co., 1 Abb. U. S., 388, 398.

It is to be remembered, too, that the two matters of *uniformity—one weight* and *one measure* throughout the realm—and *the freedom of merchants* from unreasonable tolls or impositions, were expressly embodied in MAGNA CHARTA.

"LEGISLATIVE JUDGMENT."

Again, if the Act of Congress is to be construed that, independently of all considerations of actual public

injury, the mere fact that such a contract has been made is conclusive proof of guilt, the statute becomes open to the objection that it is a "legislative judgment:" it condemns without a hearing; it adjudges guilt because of an arrangement in no wise causing injury to the public, (for to accept the fiat of the legislature that a given contract is thus fraught, fritters away the constitutional guaranty and leaves the legislative action impregnable to constitutional objection); and makes that conclusively guilty which in our land has ever been regarded as an exercise of the inherent rights of a freeman.

Stuart v. Palmer, 74 N. Y., 183, 190, 191;
State v. Julow, 129 Mo., 163;
Cooley Const. Lim., 6th ed., pp. 47, 49, 311, 429–438.

"A statute which undertakes to make an act, otherwise innocent and lawful, a criminal offence, constitutes 'legislative judgment,' without trial or sentence."

Shaver v. Pennsylvania Co., 71 Fed. Rep., 931, 938, 939.

In Lord George Gordon's case, Mr. Erskine phrased this rule in felicitous words: "There is little difference whether a man dies by the stroke of a sabre, without the forms of a trial, or by *the most pompous ceremonies of justice*, if the crime could be made at pleasure by the State *to fit the fact that was to be tried*" (1 Erskine's Speeches, by High, p. 89).

A very learned member of the bar, proceeding upon a construction of the Trans-Missouri opinion which is believed to be far beyond what this Court intended to decide, has, in an exceedingly able manner, shown that, if interpreted as assumed by him, the Trust Act is in palpable violation of the Constitution. We bespeak for that presentation the careful perusal it so richly merits.

W. D. Guthrie, Esq., in 11 Harvard Law Review, (June, 1897), p. 80.

The strongest argument in support of Mr. Guthrie's position is the order of injunction in the present case; for if Congress has power to make mere refusals to deal or to serve on the part of persons exercising a mere private occupation, criminal offences, then surely boasted American citizenship has sunk to the level of *serfdom in the feudal days!* (Yick Wo v. Hopkins, 118 U. S., 356, 370.

IX.

The Validity, Generally, of Associations Formed by Persons Engaged in a Private Business or Occupation, and of Labor Unions.

The review which has been had of the Trans-Missouri case makes it proper to consider, briefly, whether associations between persons engaged in a private business, in the form of labor unions, and other similar organizations, are indiscriminately to be condemned; and especially whether agreements between a number of such individuals not to deal with or work for others, or fixing a schedule of wages or fees for their services to be paid by those who desire to employ one of the associates, constitute *per se* and conclusively a criminal combination.

"The law by no means intends to exclude society from the benefits of united effort for legitimate purposes, and such as promote the well-being of individuals or of the public. It uses the word conspiracy in its *bad* sense."

State v. Burnham, 15 N. A., 396, 401, 402.

The Trans-Missouri case clearly recognizes (166 U. S., at 323), that although "a great and extended change in the manner or method of doing business" may produce loss or distress to those who do not or cannot conform thereto, this fact does not stamp those who provide

the improved or extended facilities as conspiring to restrain trade.

The end of promoting individual commercial success may lawfully be reached by an association for that purpose, "although its effect may have been to take business from others. * * To deny this right would be *an unwarranted interference with the management of a person's own business.*" Such an arrangement does not restrain trade. Damages resulting to competitors are mere incidents or consequences of the exercise of a lawful right, though the declared purpose of the associates may be to drive others out of the trade. "The fact that the defendant foresaw the result of his efforts, and also declared it, matters not."

Munhall v. Pennsylvania R. Co., 92 Pa. St., 150, 156, 157.

AGREEMENTS NOT TO DEAL WITH OTHERS.

The underlying principle that a party may bind himself to work for or patronize a certain other person *exclusively*, is axiomatic in every jurisprudence which recognizes the right of contract.

Greenwood, Public Policy, pp. 658, 666, 667, 676–683.

When a by-law of the Associated Press to the effect that "no member shall receive reports from a competing organization," was attacked, it was answered that the very fact that thereby the association *was made stronger and better enabled to carry on its business* was, of itself, a sufficient justification for the provision.

Matthews v. Associated Press, 136 N. Y., 333, 341.

In the leading American case on the subject, Mr. Chief Justice SHAW laid down these propositions:

"The manifest intent of the association is to induce all those engaged in the same occupation to become members of it. *Such a purpose is not unlawful* (129).

* * The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work if they so prefer. In this state of things, we cannot perceive that it is criminal *for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests*" (130). Parties not bound by contract may lawfully agree not to work for or deal with any person not belonging to the same association or who employs or deals with a non-member thereof. "It is simply an agreement amongst themselves *not to work for a person who should employ any person not a member of a certain association.*" Even though others are damaged or impoverished thereby, no legal wrong is done, so long as no fraud or force is used (131).

Comm. v. Hunt, 4 Met., 111.

Such is also the established rule in England.

Collins v. Locke, L. R., 4 App. Cas., 674, 685, 687.

"Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. * * *He may refuse to deal with any man or set of men. And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions.*"

Carew v. Rutherford, 106 Mass., 1, 14;
Bohn Mfg. Co. v. Hollis, 54 Minn., 223;
Brewster v. Miller, 41 S. W. Rep., 301, (Ky., 1897).

So it was ruled of a refusal of a stock yards company to permit a railroad company to deliver live-stock at its yards because the latter *refused to agree to deliver all live-stock* consigned over its lines *exclusively* at the yards of the former.

Delaware etc. R. Co. v. Central Stock Yards Co., 45 N. J. Eq., 50, 59–62; affirmed, 46 N. J. Eq., 280.

In a case involving the validity of a rule which prohibited members of a Musical Union from performing in connection with non-members of the same body, it was said:

"Embarrassments in business which arise from the action of those engaged in or connected with a similar business, although influenced by obligations by them voluntarily assumed in becoming members of societies, or by representations made to them by individual members of such organizations, generally give no right of action to persons so embarrassed, either against the socities or the individuals so influenced (52, 53). * * *It affords him no legal ground of complaint that others are members and voluntarily obey its rules and regulations*, although such action requires them to refuse, under certain conditions, to transact business with the plaintiff." (56.)

Thomas v. Musical Union, 121 N. Y., 45.

Speaking directly of the very rules here in question, it was laid down by a court, whose views on the general subject are of the extremest character, (Craft v. McConoughy, 79 Ill., 346; New York etc. Grain Co. v. Board of Trade, 127 Ill., 153; and Moore v. Bennett, 140 Ill., 69), that "admitting the right of the complainant to embark in and prosecute the business for which it was organized freely and without improper obstruction, it does not follow that it has a right *to deal with parties who are unwilling to so deal, or to compel those who do not choose to do so to purchase its property*. Absolute freedom of commercial intercourse to which a party may be entitled *is not interfered with by the refusal of another to deal with such party on any terms*. The refusal of any or all of the members of the Exchange to purchase live-stock of the complainant is merely *an exercise of their clear legal prerogative*, and, if they have

a right to so refuse, it is difficult to see how an agreement, as between themselves, to abstain from dealing with the complainant, is a matter in respect to which the complainant is entitled to any species of equitable relief."

American Commission Co. v. Chicago Live Stock Exchange, 143 Ill., 210, 234;
Ladd v. Southern Cotton Press Co., 53 Tex., 172, 188–192;
Seeligson v. Taylor Compressing Co., 56 Tex., 219, 227;
Board of Trade v. French, 61 Ill. App., 349.

In conformity to this unbroken line of authority, a learned court has ruled that persons engaged in the occupation of master plumbers might lawfully form a national association, with local branches in nearly all important cities, and agree *not to deal* with any manufacturer or wholesale merchant selling to a non-member; that a non-member injured as a result had no cause of action; and that a notice of withdrawal of patronage is not a "threat" within the rule applicable to cases of conspiracy: "It was perfectly competent for the members of the association, in the legitimate exercise of their own business, to bestow their patronage *on whomsoever they chose, and to annex any conditions which they saw fit.* The wholesale dealers were free to comply with the condition or not, as they saw fit. If they valued the patronage of the members more than that of the non-members, they would doubtless comply; otherwise not."

Macauley v. Tierney, 33 Atl. Rep., 1-4, (R. I., 1895), 19 R. I. —— *

On motion for rehearing, the question received long and thorough consideration, and the conclusions above announced were adhered to.

10 Harvard Law Review, p. 447, (March, 1897).

The same view has been taken by the courts in construing the Act of Congress under consideration:

"It is manifest that if the agreement were lawful, it could not be unlawful to notify the world of its existence. (853.) * * *Nor is it unlawful to agree not to deal with any trader who purchases from a competitor.* Many perfectly legitimate reasons might be suggested for such an agreement (854). * * The construction contended for * * would extend to every agreement whereby A and B agree that they will not sell goods to those who buy of C" (854).

Dueber Watch Co. v. Howard Watch Co., 55 Fed. Rep., 851.

The Law of Boycotts.

It is an entire error to suppose that the recent cases, of which Toledo etc. R'y. Co. v. Pennsylvania Co., 54 Fed. Rep., 730, is a type, lay down any different rule on the subject. In those cases the elements of force, violence, and other unlawful means intervened. Judge Taft not only distinctly ruled, in that case (at p. 738) that "*it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person and to announce their intention of doing so*," and that liability only attaches when the act is done *with malice i. e.*, with the intention to injure another without lawful excuse, but in delivering the annual address to the American Bar Association, 1895, took particular pains to say, with reference to the case in question:

"As a matter of fact there is nothing in any Federal decision, directed against the organization of labor to *maintain wages* and to secure terms of employment otherwise favorable. The courts, so far as they have expressed themselves on the subject, recognize *the right of men for a lawful purpose to combine to leave their employment at the same time*, and to use the inconvenience this may cause to their employer as a legitimate weapon in the frequently recurring controversy as to the amount of wages. *It is only when the combination is for an un-*

lawful purpose and an unlawful injury is thereby sought to be inflicted, that the combination has received the condemnation of the Federal as well as of the State courts."

Proceedings Am. Bar Assn., 1895, pp. 268, 269.

Such agreements are in nowise within the reason or the letter of the rules laid down in the modern conspiracy or "boycott" cases. These proceed distinctly upon at least two fundamental conditions, both of which are absent from this case:

a. That the defendants *intended maliciously to injure another.* This is not even charged in the bill, and as wrong is not to be presumed, the case must be treated as involving no such element.

b. That the defendants were likewise acting without *just excuse, i. e.*, a purpose to serve some lawful interest of their own.

Judge TAFT made these points very plain in the elaborately considered case of Toledo etc. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, and his views were reinforced by Mr. Justice HARLAN in Arthur v. Oakes, 63 Fed. Rep., 310. In the latter case, it was directly said that no American citizen can be forced *to deal with another against his will* and that an agreement by a number, however large, not to thus deal, was the exercise of an undoubted right, *guaranteed by the constitutional provisions.* (317, 320). Wrong intervenes when the association is formed for the *sole or leading* purpose of "maliciously injuring another, without just cause or excuse." (320, 351.)

It was conceded, even in the extreme case of Comm. v. Carlisle, Brightly N. P., 36, that *combination alone cannot be declared to be illegal* without necessarily imparting "criminality to the most laudable associations," (39), and laid down that "where the act be done and the means of accomplishing it are lawful, and the object to be attained is meritorious, combination is not conspiracy." (42).

"If that which has been done or is anticipated is

not wrongful, the fact that the defendants may have combined to do it, would not make it so."

Lewin v. Welsbach Light Co., 81 Fed. Rep., 904, 906;

Root v. Rose, 72 N. W. Rep., 1022, 1023 (N. D., 1897).

In the present state of the authorities, it is no longer open to question that parties may associate in order to thereby benefit themselves and may make it to the interest of other persons, or may persuade them, to join their association. The ony limitation upon this right which can be justly asserted is that a resort shall not be had to *unlawful means.*

Arthur v. Oakes, 63 Fed. Rep., 310;

Consolidated Wire Co., v. Murray, 80 Fed. Rep., 811, 828;

Mackall v. Ratchford, 82 Fed. Rep., 41, 42;

2 Whart. Crim. Law, 9 ed., Sec. 1338;

"Illegal Trade Rivalry," 45 Cent. Law Journal, 257. (Sept. 24, 1897.)

And all the cases recognize that such "just cause or excuse" exists in cases of organizations of persons engaged in business or labor for the purpose of promoting or bettering their condition.

Continental Ins. Co. v. Board of Underwriters, 67 Fed. Rep., 310;

Master Stevedores Assn. v. Walsh, 2 Daly, 1;

Bowen v. Matheson, 14 Allen, 499, 503;

Sharp v. Whiteside, 19 Fed. Rep., 156, with note by Dr. WHARTON, 164.

And in two recent cases decided by State courts holding extreme views on this subject, it was distinctly ruled that "it is not a *a mere passive, let-alone policy, a withdrawal of all business relations, intercourse, and fellowship, that creates the liability, but the threats and intimidation shown in the complaint.*"

Jackson v. Stanfield, 137 Ind., 592, 613;

Cote v. Murphy, 159 Pa. St., 420, 431;

Such is the unbroken line of authority:

Hunt v. Simonds, 19 Mo., 583;
Walker v. Cronin, 107 Mass., 555;
Queen Ins. Co. v. State, 86 Tex., 250;
Delz v. Winfree, 6 Tex. Civ. App., 11;
Longshore Printing Co. v. Howell, 26 Ore, 527;
Thomas v. Cincinnati etc. Ry. Co., 62 Fed Rep., 803, 820;
U. S. v. Cassidy, 67 Fed. Rep., 698, 711;
Gibson v. Lawson and Curran v. Treleavan, 1891, 2 Q. B., 545, 559, 561, 562;
Carson's Wright Crim. Conspiracies, pp. 154, 155, 174.

The unsettled condition of the English law on this general subject induced Mr. Wright's treatise on "The Law of Criminal Conspiracies and Agreements." The author is now one of the justices of the Queen's Bench Division, and his treatise has been characterized as "a work of remarkable ability," (3 Steph. Hist. Crim. Law, 209; Lord COLERIDGE, in Gibson v. Lawson, 1891, 2 Q.B., at 560); and as a "subtle and expansive treatise (which) cannot fail to be the despair of future writers on the same subject." (Neville, Strikes, Preface, IV.). So far as lies within the power of human ability, the true rule on the subject has there been extracted from multitude of apparently irreconcilable cases to be found in the English reports.

It has recently been pointed out that even under the most extreme view of the law of conspiracy ever announced from a bench, unless it be the overruled opinion of Judge JENKINS, a combination to resist *an attack upon the lawful rights* of an association falls within the qualification above indicated and has the justification of the service of an *interest* or of a *lawful purpose*. Here, certain parties have announced a purpose to wage war on the Exchange and, if possible, to destroy its existence. The members of that organization, knowing that its continuance is not only absolutely essential to

the maintenance of the high standing of an important trading point, but also to further their own lawful interests, naturally and justifiably *decline to permit the attack to succeed.* They have, indeed, the right to wage the same war and to adopt the same measures invoked by their assailants and to combine for that purpose. Their action in doing so is not a conspiracy, nor can it be said that their "*real object*" is to maliciously injure the party who invites a controversy. The purpose of protecting the Exchange is a lawful one, and negatives any malice, in a legal sense, and "this is the *essential element* on which are founded *all the decisions* as to common-law conspiracy in this class of cases."

Cote v. Murphy, 159 Pa. St., 420.

In all these cases, it is to be remembered that "whatever, or however numerous or formidable may be the allegations of conspiracy, of malice, or oppression, of vindictive purpose, they are of no avail; they merely heap up epithets, unless the purpose intended, or the means by which it was to be accomplished, are shown to be unlawful."

Rich v. New York etc. R. Co., 87 N. Y., 382, 394;

O'Callaghan v. Cronan, 121 Mass., 114, 115, (GRAY, C. J.);

Bohn Mfg. Co. v. Hollis, 54 Minn., 223, 231, 232;

Day v. Brownrigg, 10 Ch. Div., 294, 302;

Payne v. Chandler, 134 N. Y., 385.

In the very recent case of Temperton v. Russell, 1893, 1 Q. B., 715; 4 Reports, 376,—which has been much criticised and must be conceded to be most extreme,—Lord ESHER distinctly ruled that the associates "had a *perfect right* to adopt their rules so as to bind *their own members* and they had a right to *insist on obedience* from such members." (4 Reports, at 380.)

In the most recent English case on the subject,

Lord Justice LINDLEY strongly emphasized these views.

Lyons v. Wilkins, 1896, 1 Ch., 811, 822.

The point that the coercive power (as distinguished from argument, persuasion or moral influence) of the associates is brought to bear upon *third persons* is declared to be the distinguishing feature upon which rest such cases as Comm. v. Carlisle and People v. Fisher, (the latter which "goes too far and cannot now be sustained," 2 Whart. Crim. Law, 9 ed., Sec. 1366, p. 215, note). Where the rules are sought to be enforced *solely against members* of the association, Comm. v. Hunt and kindred cases are indisputably correct.

Carson's Wright Crim. Consp., pp. 156, 157.

The power to make rules necessarily implies the right and power to enforce them (Dos Passos, 40), and the apprehension of a member that by violating a rule he wili endanger or lose his membership involves no element of duress, a threat, or unlawful means.

Quincey v. White, 63 N. Y., 370, 376.

The authorities on the subject are most exhaustively reviewed by Judge MCKENNA in Continental Insurance Co. v. Board of Underwriters, 67 Fed. Rep., 310.

In that case (at 322), and in Thomas v. Cincinnati etc. Ry. Co., 62 Fed. Rep., at 820, it is shown that in such a case as this the circumstances conclusively negative any suggestion of *personal malice.*

"To say that *if they continued to sell to plaintiff the members of the association would not buy from them is not a threat.* It does not interefere with the dealer's free choice. It may have prompted him to a somewhat sordid calculation. *It may have considered which custom was the most profitable, and have acted accordingly. But this was not such coercion and threats as constituted the actions of the combination unlawful.*"

Cote v. Murphy, 159 Pa. St., 420, 431;

Macauley v. Tierney, 33 Atl. Rep., 1; 19 R. I.,

——.*

"Cases where men voluntarily agree to observe rules

adopted by themselves" involve no element of boycott, conspiracy, or the like, (Jackson v. Stanfield, 139 Ind., 592). It is only when the associates undertake, "*by unlawful means, to overawe others*," *i. e.*, persons free to act and who have not agreed to abide by certain rules or a given contract, that a wrong is done, as in U. S. v. Workingmen's Council, 55 Fed. Rep., 994, 1000, and kindred cases.

Rogers v. Evarts, 17 N. Y. Supp., 264, 267, 269;
Affirmed, *sub nom.*, Reynolds v. Everett, 144 N. Y., 189.

Nor can it be said that it is illegal for the members to desire that all persons in the same business shall join the organization.

Comm. v. Hunt, 4 Metc., 111, 129.

Much less that although strong efforts are constantly being made *to force the privileges of membership on others*, nevertheless, the body aspires to be a *monopoly*.

Such a suggestion is conclusively answered by remembering that the Exchange *is not engaged in business at all* and, therefore, cannot be or become a monopoly.

Dos Passos, Stock Exchanges, pp. 13–15.

It has been repeatedly said that rules limiting the privileges to members in good standing were free from any taint of conflict with public policy. This was true even where membership was limited to *a few* and *denied to many anxious aspirants*.

Belton v. Hatch, 109 N. Y., 593, 599;
Goddard v. Merchants' Exchange, 9 Mo. App., 290, 295, 297;
Albers v. Merchants' Exchange, 39 Mo. App., 583;
People v. Produce Exchange, 149 N. Y., 401;
Ex parte Haebler, 149 N. Y., 414, 425.

Indeed, without such a rule an Exchange could not be maintained at all.

McQuillen v. Real Estate Exchange, 39 N. Y. St. Rep., 426; 15 N. Y. Supp., 206.

It is essential to the successful operation of such a body and to the diffusion of its beneficial effects that harmony shall characterize the relations of its members, and that care must be taken not to overload the market thereby established.

Hitch v. Hawley, 132 N. Y., 212.

In this instance, strangely enough, it is bitterly complained that there *is no such limit*, but that, on the contrary, the body is offering its privileges, and even *urging* them, *on all reputable persons alike*. Truly a most extraordinary monopoly!

ILLUSTRATIVE CASES.

Similar rulings have been made concerning

a. Clearing houses:

O'Brien v. Grant, 146 N. Y., 163, 173.

b. Agreements to deal exclusively at given stock yards:

Ellerman v. Chicago Junction Ry. Co., 49 N. J., Eq., 217, 252–258;

Fuller v. Hope, 163 Pa. St., 62.

c. To control the supplying of sailors at the city of Boston:

Bowen v. Matheson, 14 Allen, 499, 502.

d. An arrangement by which one elevator was to store and handle all grain coming over a given railroad:

Richmond v. Dubuque etc. Ry. Co., 26 Ia., 191, 201, 202;

S. C., 33 Ia., 422, 498;

S. C., 19 Wall, 584, 590.

e. An agreement by a railroad company to deliver all live stock at a named stock yards:

Covington Stock Yards v. Keith, 139 U. S., 128, 132, 133, 136.

f. A contract by a railroad company giving to one sleeping car company the exclusive right to operate such cars for a long period:

Chicago etc. R. Co. v. Pullman Co., 139 U. S., 79, 83, 90, 91.

g. An agreement to permanently give a ferry company the exclusive right to transport freight across the Mississippi river at St. Louis:

Wiggins Ferry Co. v. Chicago etc. Ry. Co., 73 Mo., 389, 409, 410; S. C., 119 U. S., 615.

h. An association among the cotton compressing companies of Galveston to compel all persons coming to said market to store their cotton with them and to pay certain arbitrary charges:

Ladd v. Southern etc. Co., 53 Tex., 172, 188, 192;

Seeligson v. Taylor etc. Co., 56 Tex., 219, 227;

Greenhood, Public Policy, p. 658.

i. An agreement among the base ball clubs of the United States,—declared to be engaged in an important business in which much capital stood invested, (for an illustration, see Philadelphia Ball Club v. City of Philadelphia, 38 Alt. Rep., 356),—that each club should have an exclusive option upon the services of all players under contract to it, for the ensuing season:

Metropolitan Exhibition Company v. Ewing, 42 Fed. Rep., 198, 203;

Metropolitan Exhibition Co. v. Ward, 24 Abb. N. C., 393, 419, note;

American Base Ball Club v. Pickett, 8 Penn. Co. Ct., 232;

1 Beach, Injunctions, §453.

Agreements Fixing Wages, Commissions, and Fees of Persons Engaged in a Private Occupation.

Agreements among persons engaged in a mere pri-

vate occupation fixing the wages or commissions at which they are willing to serve have been sustained in a multitude of cases.

Ladd v. Southern Cotton Co., 53 Tex., 172, 188, 193, (approved, 143 Ill., at 238);

Reg. v. Rowlands, 5 Cox C. C., 436, 460, (79 Eng. Com. Law Rep., 685, note *a*);

Collins v. Locke, L. R., 4 App. Cas., 674, 685;

Sayre v. Louisville Benev. Assn., 1 Duval, 143, 145, 146;

Carew v. Rutherford, 106 Mass., 1, 14;

Snow v. Wheeler, 113 Mass., 179, 185, 186;

Master Stevedores Assn. v. Walsh, 2 Daly, 1, 5, 7–12;

People v. Barondess, 61 Hun, 571, 588, (views of DANIELS, J., approved by Court of Appeals, 133 N. Y., 640);

Queen Ins. Co. v. State, 86 Tex., 250, 265–268, 269–275, (exhaustive review);

Longshore Printing Co. v. Howell, 26 Ore., 527, 539–543, (full discussion).

The cases on the subject are elaborately annotated by A. C. Freeman, Esq., in a note to People v. Fisher, 28 Am. Dec., 507, in which the conclusion is reached that "*this is a plain right upon which no doubt ought ever to have existed.*" (508).

See, also,

U. S. Chemical Co. v. Provident Chemical Co., 64 Fed. Rep., 946, 950;

Bonsack Machine Co. v. Smith, 70 Fed. Rep., 383, 388;

Am. Live Stock Com. Co. v. Chicago Live Stock Exchange, 41 Ill. App., 149, 152;

Olmstead v. Distilling & Cattle Feeding Co., 77 Fed. Rep., 265, 269, 270.

It deserves to be noticed, in passing, that none of the many agreements noted in the books by which one person has bound himself to render services exclusively

to another, have been annulled as in restraint of trade and that the law has settled to an acceptance of the views expressed and distinctions drawn by Lord ELDON in Morris v. Colman, 18 Ves., 437.

Lumley v. Wagner, 5 De G. & S., 485, 513; on appeal, 1 De G., M. & G., 604, 620, 621;

Whitwood Chemical Co. v. Hardman, 1891, 2 Ch., 416;

Daly v. Smith, 38 N. Y. Super., 158; 49 How. Pr., 150.

Learned annotators and the text-books concur in saying that there is no good reason for denying the validity of contracts of this nature.

Benjamin Vaughn Abbott, Note to McCaull v. Braham, 16 Fed. Rep., at 48;

1 Beach, Injunctions, pp. 452–459.

In one of the cases universally cited in connection with the law concerning unlawful trade combinations and monopolies, a learned American judge distinctly said: "*To fix a standard of prices among men in the same employment, as a fee bill* (here a schedule of commissions), *is not in itself criminal*, but may become so when the parties resort to coercive restraints or penalties upon the employee or employer, or, what is worse, to force of arms."

Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St., 173, 188.

It is sometimes urged that some of the older English cases deny the right of to thus agree. While it is doubtless true that the cases in the courts of England have been so largely based on statutes and controlled by policies which have not been adopted in this country, and are, therefore, of slight weight with us, (Carson's Wright Crim. Consp., p. 152; SHAW, C. J., in Comm. v. Hunt, 4 Met., 110), yet as the statutes and policy referred to were strongly *against the laborer*, (3 Steph. Hist. Crim. Law, p. 209), judicial recognition of the right to agree upon a schedule of wages is strong

evidence that, ordinarily, such an agreement is not illegal.

Thus, in Rex v. Ball, 6 C & P., 563, 570, WILLIAMS, J., in view of what has "been ignorantly supposed or represented," was particular to say that a mere agreement to maintain *an agreed table of wages* was not unlawful combination.

In Reg. v. Rowlands, 5 Cox C. C., at 460, also 17 Q. B., 686, *n*, Mr. Justice ERLE, a very great authority on this branch of the law, charged the jury that, "the law is *clear* that workmen *have a right to combine* for their own protection and *to obtain such wages as they choose to agree to demand.* * * A combination for the purpose of injuring another is at once a combination of an entirely different nature." On appeal, Lord Chief Justice CAMPBELL approved this charge, saying that "it was the right of the defendants, as English workmen to make the best of their labour, and to refuse to work unless *the terms upon which they were invited to work* were satisfactory," (17 Q. B., 671; also 6 Den., (Brit. Crown Cas.), at 388), to which he added, as reported in 5 Cox C. C., at 489, "That each might do that and the whole might do it." In passing sentence PATTESON, J., said that "the masters were at liberty to give what rate of wages they liked and to agree among themselves what wages they would pay. In like manner *the workmen were at liberty to agree among themselves at what wages they would work*" (389).

Regina v. Rowlands, 6 Den., (Brit. Crown Cas.), 364.

In a charge set out in a note to this case, (6 Brit. Crown Cas., *p. 384), and also in 5 Cox. C. C., 495, Mr. Baron ROLFE, (afterwards Lord CRANWORTH), laid down these propositions: "Those who are to employ labour may meet and say, 'we will not give more than such and such a rate, or we will stipulate for such and such a number of hours work; we will make, in short,

regulations beneficial to ourselves as employers, and we will agree that we will not take any workmen that require more.' On the other hand, the workingmen may meet and say *we will not work for less than such and such sums*, and if anybody thinks to employ us on low wages *we will not work for them*, and we agree to form a fund and support one another until we get them to come to proper terms. * * *It is doubtless lawful for people to agree among themselves not to work except upon certain terms.* That being so, I am not aware of any illegality in their peaceably *trying to persuade others to adopt the same view.*"

Indeed, unless this were true, as Dr. Wharton well remarks, "there are few joint operations for money making which would escape indictment. The regulation of industry would be left, *not to private enterprise and experience, but to the criminal courts.*"

2 Whart. Crim. Law, (9th ed.) Sec. 1366, pp. 215, 216, *n.*

Where the objection has taken the form that such agreements are in restraint of trade, well-considered cases have noted the important distinction asserted by counsel for the City of London in Player v. Vere, T. Raym., 324, 326, and not dissented from by the eminent Sir ROBERT SAWYER, who was adversary counsel, and so clearly recognized by Lord ESHER (23 Q. B. D., at 609), namely, "*This is not a trade but an employment.*" The concurrence of counsel and court was doubtless in recognition that in the Silk Throwster's case, as reported 2 Keb., 309, 310, the distinction, in respect of this branch of the law, between *manufacture* and *trade or commerce*, upon which this Court proceeded in United States v. E. C. Knight Co., 156 U. S., 1, had been authoritatively established.

So, Lord ELDON declared, when a contract came before him which involved personal services, in answer to the objection that it was in restraint of trade: "*The case of trade is perfectly distinct.*"

Morris v. Colman, 18 Ves., 437.

"Every trade is business, but *every business is not a trade;* to answer that description it must be conducted by *buying and selling*."

Doe v. Wetherell, 2 A. & E., 161;

Harris v. Amery, L. R., 1 C. P., 148, 158.

The fundamental distinction thus indicated has been fully adopted in the American courts.

Kentucky Bridge Co. v. Louisville etc. Ry. Co., 37 Fed. Rep., 567, 615-618, (Mr. Justice JACKSON);

Bloom v. Richards, 2 Oh. St., 387, 396;

National Benefit Co. v. Union Hospital Co., 45 Minn., 272, 276;

Queen Ins. Co. v. State, 86 Tex., 250, (full discussion).

And stands supported by the many rulings of this Court that mere personal services, however much they may *aid* commerce, do not constitute the doing of business, in the sense of commerce.

Nathan v. Louisiana, 8 How., 73, 81;

Paul v. Virginia, 8 Wall., 168, 183;

Munn v. Illinois, 94 U. S., 113, 165;

Budd v. New York, 143 U. S., 517, 541, 542, (approving Stone v. Yazoo etc. R. Co., 62 Miss., 607, 639, 640);

Brass v. North Dakota, 153 U. S., 391, 401.

And, considering the occupation of its broker members, the important purpose of an Exchange to *establish uniformity* could not be accomplished without prescribing *a schedule of commissions* to be charged. Unless observance of this schedule can be enforced, the usefulness of the body will be greatly impaired, if not wholly destroyed, and it will be impossible for it to "establish anything like uniformity in the business of its members."

People v. Fire Underwriters, 7 Hun, 248, 251, 252.

It necessarily follows from the rules established by these and kindred cases that such an association cannot be characterized as a *monopoly*,—a point likewise disposed of by Mr. Justice STORY'S opinion in Charles River Bridge v. Warren Bridge, 11 Pet., 420, 606, 607; by the decision in Railroad Co. v. Richmond, 26 Iowa, 191, 201, 202; 19 Wall., 594; and by the carefully prepared deliverance of Mr. Justice JACKSON in *In re* Greene, 52 Fed. Rep., 104.

LABOR UNIONS.

It was conceded by counsel in the circuit court that if the defendants were *laborers*, their organization would be valid. The authorities, if distinction in this respect they make at all, place Exchanges upon even a more favorable basis than Labor Unions, probably because experience has demonstrated that Exchanges have no tendency to bring about a resort to means which the law stamps as unlawful, and that the rules and operations are distinctively beneficial to the development of commercial intercourse. Certainly, there can be no valid reason for saying that a man ceases to be entitled to his rights as a freeman because his vocation happens to be that of a live-stock commission merchant. At the very least, it must be said that the rules of law in the premises apply to *all personal services alike*, whether they happen to be rendered in a work-shop or at a stock-yards, (137 U. S., at 415), whether the persons are skilled or unskilled, (18 Ves., 437), and whether their compensation is by way of wages, commissions, salaries, or fees, (86 Tex., 250).

X.

ANALYSIS OF BILL OF COMPLAINT.—REVIEW OF OPINION OF CIRCUIT COURT, AND OF INJUNCTION ORDER.

An analysis of the bill of complaint, and a review of

the order appealed from and of the opinion delivered in justification thereof, may serve to present some of the questions involved in more concrete form:

The Bill Analyzed.

Without setting forth in detail the allegations of the bill to the effect that the purposes of the defending Exchange are to *promote* and *increase* trade, and not to obstruct and restrain it, and the very great success which has attended the efforts and usages of its members, its contentions may be thus summarized and disposed of:

1. The extent, magnitude, and importance of the Kansas City Stock Yards are wholly irrelevant; they do not constitute it a *public market*, nor in any wise affect the rules of law to be applied to this case. It is a mere private enterprise and its character can be changed only by valid *legislation*. (American Com. Co. v. Chicago Live-Stock Exchange, 143 Ill., 210; Delaware etc. R. Co. v. Central Stock Yards Co., 45 N. J. Eq., 50; Express Cases, 117 U. S., 1.)

The bill of complaint in the present case was filed in December, 1896, and prior to the enactment of the present Kansas Statute declaring the Stock Yards to be public. The case must, of course, be judged as of the date of the filing of the bill; and there was no supplemental pleading.

Besides, the character of the Stock Yards in this respect has no effect on the status of commission merchants engaged in business there; their occupation is, in any event, a merely *private* one. (143 Ill., at 236, 237; 107 U. S., at 699.)

2. The first substantive allegation is that if the consignee of live-stock is not a member of said Exchange, he cannot sell or dispose of the same at that market "for the reason that such members, as required by the rules to which they have subscribed, refuse to

deal with a person who is not likewise a member." If it is meant to charge that members ever refuse to deal with a person *not engaged in acting as a commission merchant*, the allegation is overwhelmingly shown to be false in fact, and will be conceded to have been inserted by mistake on the part of counsel. In a legal sense, it would be immaterial, however, even if it were true; for the allegation is merely of a refusal to deal, "a mere passive, let-alone policy," and not of a resort to any means which the law declares to be unlawful, nor of a predominant malicious motive, elements essential even where the doctrine of Bohn Mfg. Co. v. Hollis, 54 Minn., 223, and kindred cases, is doubted or denied, (Jackson v. Stanfield, 137 Ind., 592, 613; Cote v. Murphy, 159 Pa. St., 420, 431.) The allegation has no tendency to prove a monopoly, for the services of the commission merchants being essentially private, business intercourse with them, has never been a matter of *common right*. "It is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so." (TAFT, J., 54 Fed. Rep., at 738.)

3. The allegation that the owner of live-stock is "compelled" to consign them to a member of the Exchange and "prevented" from otherwise reaching said market, thus being hindered, delayed, obstructed and put to extra expense and loss, followed by the charge that the Stock Yards Company allows no one but such members to transact business at its yards, were doubtless intended to wear an exceedingly formidable aspect. The market is shown to be open to all who may choose to come there, and the allegation that an owner of cattle is in any wise impeded in respect to it is shown to be palpably false. There is not the slightest basis for the allegation that the Stock Yards Company excludes all others, except the defendants, from access to the yards. Indeed, if such were the case, brokers could not do business: it needs

buyers and sellers to realize commissions. It was probably intended to charge that *if* a seller desired to employ a *non-member* broker, the latter would meet with a refusal on the part of members to have business intercourse with him.

Taking the allegation in its broadest possible scope, and considering it in a legal sense, there is not the slightest element of wrong in the situation alleged:

No one is "*compelled*" to do business at the Stock Yards or to employ a member of the Exchange. No force, violence or intimidation is visited on a live-stock owner, nor has any such owner bound himself to ship to such yards exclusively or to employ no one but a member of the Exchange. That the course of business and surrounding circumstances make it to the interest of an owner to ship to that market and to employ one of such members to act for him, even if the sole and precise effort of the associates has been and is now to create and maintain that interest, does not, under any case ever decided by any court, constitute an illegal combination or act in pursuance thereof.

It is true even in Pennsylvania, where the doctrine of Comm. v. Carlisle, admitted to be an extreme one, is still adhered to, and where Bohn Mfg. Co. v. Hollis, 54 Minn., 223, was therefore declined to be fully followed: To say to other dealers "that if they continued to sell plaintiff, the members of the association would not buy from them *is not a threat.* It does not interfere with the dealer's free choice. It may have prompted him to a somewhat sordid calculation. He may have considered which custom was most profitable, and have acted accordingly. *But this was not such coercion and threats as constituted the acts of the combination unlawful.*"

Cote v. Murphy, 159 Pa. St., 420, 431.

See, also, for full discussion, Macauley v. Tierney, 33 Atl. Rep., 1, and the opinion of DANIELS, J., in Thomas v. Musical Union, 2 N. Y. Supp., at 199, *et seq.*,

which was adopted by the Court of Appeals, (121 N. Y., 45.)

An owner is free to ship there or not, as he chooses; he may ship elsewhere or not at all. He may employ a member of the Exchange to act for him, or he may decline to do so. If it is to his interest he will doubtless make such shipment and employment; but to create the circumstances which produce such interest is not only lawful, but the exercise of a constitutional right.

4. *a.* The right to fix commissions, salaries and wages for services to be rendered, and to unite into an association or union for the purpose of creating uniformity and preventing rebates, discrimination and favoritism, or even for the very purpose of securing compliance with the schedule agreed on, has already been considered. The cases cited, *supra*, establish that such agreements are so clearly lawful that it is strange that there should ever have been any doubt on the subject, (28 Am. Dec., at 508; 2 Daly, at 11), and that they are beneficial to the parties and in nowise infringe upon the interests of the public (67 Fed. Rep., at 711). Where an Exchange is under consideration such a schedule is indeed absolutely essential to promote the purposes of the organization (People v. Fire Underwriters, 7 Hun, 248, 251, 252). The only recent case to the contrary is Moore v. Bennett, 140 Ill., 69. It has been pointed out, on an elaborate review of the authorities, that this case ignored the established and fundamental distinction (declared, among others, by Lord ELDON in Morris v. Colman, 18 Vesey, 437; by Lord DENMAN in Doe v. Wetherell, 2 A. & E., 161; by Mr. Justice JACKSON in Kentucky Bridge Co v. Railway Co., 37 Fed. Rep., at pp. 615, 618; and by MITCHELL, J., in National Benefit Co. v. Hospital Co., 45 Minn., 272, 276; and recognized in the subsequent case of American Com. Co. v. Chicago Live-Stock Exchange, 143 Ill., 210), between combinations to fix the prices of *commodities*, and agreements upon a schedule

or tariff of compensation to be made for *services* to be rendered.

Queen Ins. Co. v. State, 86 Tex., 250, 273.

In the leading case on the general subject of combinations to fix prices, this distinction is pointedly declared.

Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St., 173, 188.

b. The associates also have the right to regulate the number of solicitors to be employed and their qualifications and to prohibit the solicitation of business by means of prepaid telegrams. These and similar provisions are incident to every Exchange. In many of them members are prohibited from forming a partnership with a non-member and from employing clerks not approved by the governing committee. The London Stock Exchange does not permit its members to advertise at all, viz., no solicitors whatever can be employed, and forbids circulars to be sent to others than principals, which, in principle, is the same as regulating the sending of prepaid telegrams. The Paris Bourse prohibits the employment of more than two head-clerks. The Memphis Cotton Exchange prohibits the sending of a prepaid telegram. The restriction upon the number of solicitors to be employed protects the financially weaker members against the efforts of fellow-members who are able to employ an unlimited number of "drummers," and to gather all the business to themselves by means thereof. Dispensing with soliciting agents or the control of them would not be illegal; nor can an agreement relative thereto be an illegal contract. The prepayment of telegrams stands upon a similar footing. The public is not injured thereby, for it has no right to be visited and importuned by solicitors, nor to have telegrams sent to it free from expense.

Koehler v. Feuerbach, 2 Mo. App., 11.

A graphic picture of an actual occurrence pointedly teaches what disasters will surely befall an Ex-

change which permits its members to resort to reckless methods.

Hitch v. Hawley, 132 N. Y., 212, 213.

Of an arrangement between certain manufacturers to reduce the number of traveling salesmen, VAUGHN, B., said that "in consequence of the loss and inconvenience which the parties had before sustained, they entered into this agreement, by which the loss and benefit to each is reciprocal, * * a contract by which the public are not injured as they may be supplied on easier terms," *i. e.* the expenses of carrying on the occupation being reduced, lower charges may prevail or better service be rendered for the prevailing rate.

Wickens v. Evans, 3 Y. & J., 318, 330.

It is to be noted, however, that under the rule at bar, *actual sales* may be thus reported to a consignor and that *purchasers* may be invited to attend, whether members or not.

Such agreements are not only the basis of all Exchanges and other co-operative organizations, but are embodied in thousands of contracts of every character and description. Presumptively, this rule stands as the unanimous compact of the associates (143 Ill., at 233, 234), and as all interests concur in the propriety thereof, and as they are common to every similar Exchange in the land, no room is left for questioning the beneficial purposes and effect thereof. (105 U. S., at 563; L. R., 4 C. P., at 48; L. R., 10 Ex., 337, 353).

c. Having the right to make these regulations, it necessarily follows that the same can be enforced (Dos Passos, 40). Indeed, membership is held subject to the condition that none of the rules will be violated, and a violation, adjudged by the tribunal agreed upon, terminates the membership: by failing to observe the rules, a *member elects to withdraw.* (Wilson v. Lewis, 121 N. Y. 284; Greer v. Stoller, 77 Fed. Rep., 1, 8.)

5. Rule XVI. is the only limitation upon members as to dealings with others. Comparing that rule

with the provisions to be found on the same subject in other Exchanges, and with the agreements embodied in many contracts which have come before the courts, it will be observed that here the limitations upon the contracting parties are of *the mildest nature*. (Continental Ins. Co. v. Board of Underwriters, 67 Fed. Rep., 310; Dueber Watch Co. v. Howard Watch Co., 55 Fed. Rep., 851.) Dealings are not to be had with, *a*, persons violating the rules, nor, *b*, suspended or expelled members. As there is no absolute right to be a member, nor to have dealings with any given person, the limitation could have been broadened so as to prohibit the transaction of business with *all non-members whatsoever*, without infringing, in the slightest degree, upon any rule of law known to civilized jurisprudence. (Matthews vs. Associated Press, 136 N. Y., 333, 341.) It is to be noticed that there is no allegation in the bill of personal malice, or that the sole purpose was to injure another, or of a resort to any unlawful means. (Comm. v. Hunt, 4 Met., 111; Pettibone v. U. S., 148 U. S., 197, 203.)

Indeed, it is the distinguishing characteristic of an Exchange that all dealings had under its auspices shall be with parties subject to its rules and disciplinary jurisdiction. (White v. Brownell, 2 Daly, 329; State v. Chamber of Commerce, 47 Wis., 670, 683). If non-members are to be adjudged as entitled to the privileges, but free from the correlative obligations to obey the rules, why have Exchanges at all? The promise of such obedience is the condition upon which membership is granted and only by the performance of this contract can the privileges of membership be retained. (White v. Baxter, 9 Jones & S., 359; affirmed, 71 N. Y., 254; Walls v. Bailey, 49 N. Y., 464; Lewis v. Wilson, 121 N. Y., 284; Hyde v. Woods, 94 U. S., 523, 525).

6. The allegation that a monopoly was intended to be created might well be dis-

regarded as being a mere conclusion, without a sufficient statement of facts to support the same; but, construing the bill in the broadest sense, the intimation of a monopoly is readily dispelled:

a. The matter involved consists of mere *personal services*, to which the rule against monopolies does not apply, especially where the occupation is *a merely private one.* It is of *no interest to the public who serves them*, so long as the charges are reasonable and the facilities adequate. (Express Cases, 117 U. S., 1, 21, 24; Chicago etc. R. Co. v. Pullman Car Co., 139 U. S., 79, 89–91; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St., 173, 188).

b. Membership in the Exchange being purely a matter of contract and not one of antecedent common right, there can be no monopoly in regulating who shall be entitled thereto, however great the inducement to the public to employ members of that body, so as to obtain the advantages of the association, and though such advantages can only be had by dealing exclusively with a member. (52 Fed. Rep., 104.)

Thus, the right of Exchanges to decide what property they will permit to be dealt in by its members or under the auspices of its rules has been firmly established, though the organization be so powerful that its refusal to admit a given article had the effect to make it practically *non-marketable.*

Young v. Cole, 3 Bing. N. C., 724;
Reg. v. Aspinall, 2 Q. B. D., 48, 61, 62, 63, 64.

c. The defendant Exchange does not even undertake to limit the number of its members, but offers membership to all reputable persons, without discrimination in any respect.

d. The Exchange itself is *not engaged in business*, and its rules merely constitute an "*honorary agreement*" between the members to conform to certain rules in their dealings.

Lord BLACKBURN in Tompkins v. Saffery, L. R., 3 App. Cas., at 232.

e. As the fines provided for cannot be recovered by suit, the only effect of a non-payment is a withdrawal from membership. So, also, a member can withdraw *at pleasure.* Hence, the agreement is binding only in honor and no longer than a member chooses to observe it. The only restriction is that a member will comply with the rules *so long as he elects to retain his membership.* (Greer v. Stoller, 77 Fed. Rep., 1, 8.)

7. The case of Thomas v. Musical Union construed a State conspiracy statute, quite as broad as is the Act of Congress of July 2, 1890, in the light of by-laws of an organization of musicians requiring each member to *refuse to perform in an orchestra or band in which any non-member was engaged;* to refuse to employ or engage a suspended member or non-member; and *to refuse to assist in any performance in which amateurs participated.* It was held by DANIELS, J., in the Supreme Court, (2 N. Y. Supp., 197–204, and 17 N. Y. St. Rep., 51), in an opinion which met the approval of the Court of Appeals (121 N. Y., 45), that a notice to a member that if he acted in violation of these by-laws by performing with or employing a non-member, he would be expelled was in no sense a *threat.* "*If he elected to continue a member of the union, then the by-laws required him to employ his fellow-members to the exclusion of other persons. If he was not satisfied to submit to that restraint, he was at full liberty to withdraw, and to employ whomsoever he might choose.*"

See, also People v. Barondess, 61 Hun, 571; Quincey v. White, 63 N. Y., 370, 376.

THE OPINION OF THE CIRCUIT COURT.

(Record, 267; 82 Fed. Rep., 529.)

a. The trial court approached the question of de-

fendants' guilt under the Act of Congress by declaring that *their rules alone* were not to be considered, but the "practical working and results of the defendants' methods" should also be looked to, and the latter were made the *sole* basis of the conclusions announced. Indeed, one would suppose from this branch of the opinion that Greer, Mills & Co. were complainants of record, in form as well as in substance.

The order of injunction, however, was not limited to given workings and results, but adjudges certain rules to be void *in their entirety*, and however construed or enforced.

The better rule, and the only one which can fairly be applied where the action is by the Government in the (at least nominal) assertion of a public interest, is to take the rules as having been *bona fide* entered into and as expressing the real purposes of the associates. Isolated acts by given members cannot serve to condemn the organization *in toto*. The general doctrine on the subject has been laid down by HAYES, J., as follows:

"The question whether a society has been established for illegal purposes or not, ought, as I think, with rare exceptions, to be decided *by the rules themselves*, which declare the objects of the society and speak *the voice of all its members*. * * * If the rules are legal in themselves, it is, I conceive, the duty of the officers to carry them out legally. The best of rules may be abused in practice, but if, in such a case, the abuse is the fault of *individuals*, it ought not to be viewed as affecting the rules themselves or the general purposes of the society to which they belong."

Farrer v. Close, L. R., 4 Q. B., 602, 618.

The views of HANNEN and HAYES, JJ., in this case were accepted in Arthur v. Oakes, 63 Fed. Rep., 310, 327, where it was also laid down by Mr. Justice HARLAN, as the organ of the Court, that in such a case an order of injunction, if granted, should not condemn the rules indiscriminately and as a whole, but, on the contrary,

the precise wrongful practices should be carefully described.

The same principle was applied by Judge McKenna in the elaborately considered case of Continental Ins. Co. v. Board of Fire Underwriters, 67 Fed. Rep., 310, 322. After holding that it would be extremely inconsequential to say that the rules were adopted for the primary purpose of maliciously injuring others, or for any other reason than those which the law permitted, that learned judge dissolved a general restraining order and substituted one enjoining a few acts, specifically described, which he adjudged to be unlawful, (323).

b. In the case at bar the circuit court proceeded to point out the extent of the Kansas City Stock Yards and the magnitude of the business there carried on, of all of which the defendants were, at another point of the opinion, declared to be the "*active promoters*", and then found that the operation of Rule XVI. was to "*shut out all dealings and business intercourse between members and non-members of the association.*"

This conclusion was predicated of a construction that that rule necessarily means that *all who are not members* of the Exchange are *violating* the rule. In other words, that *a failure to join*—mere non-action—operated as the equivalent of an *affirmative violation.* It has been generally supposed that such a provision, whether found in a statute, or in a private contract, meant that a violation consisted of affirmative action *contrary to* a given course, (People v. Produce Exchange, 149 N. Y., 401, 410). And even if the circuit court had desired to forbid the Exchange from advising its members that a given person was not a member of the Exchange to the end that they might stand advised that in dealing with such person they would not have the protection afforded by the rules, (especially, sections 6, 7, 8 and 13 of Rule IV., Rules VII., XV., XVIII., and XXI.), or for any other similar purpose, and to use the means of communication agreed on for that purpose—

the general bulletin board—,it is to be noted that the injunction order was not limited to such a course of conduct.

c. Be the construction of the rule what it may, it is to be noted that *mere business non-intercourse* is the extent of the wrong claimed to have been done, and this is characterized to constitute a "*boycott.*" This definition of unlawful means is substantially the whole superstructure of the opinion upon the merits of the case.

It is ventured that there is no case in the books, recognized as authority at the present day, which lends support to such a conclusion. The cases of Cote v. Murphy, 159 Pa. St., 420; Jackson v. Stanfield, 137 Ind., 592, and Macauley v. Tierney, 33 Atl. Rep., 1, establish the converse most clearly, and, as Judge TAFT said before the American Bar Association, in 1895, there is no Federal case to a contrary effect. Even Judge JENKINS, in his overruled opinion in Arthur v. Oakes, (60 Fed. Rep., at 824), frankly modified his original injunction so as to avoid a possible construction in accord with what the circuit court expressly ruled in the present instance.

The explanation of the views laid down in the opinion at bar is readily to be found in the fact that the same court had previously ruled that all associations to accomplish a given end were unlawful, without regard to whether the act or the means were of themselves unlawful; in short, that all *combination was necessarily conspiracy.*

> Oxley Stave Co. v. Coopers' Union, 72 Fed. Rep., 695, 698.

Assuming the facts of that case to have been that the defendants were moved by a malicious purpose to injure the plaintiff and that, to this end, they, without having a just cause or excuse, used "threats" and exercised intimidation against third persons, who were in no wise concerned in the principal controversy, the order made is warranted by the cases elaborately re-

viewed in Consolidated Wire Co. v. Murray, 80 Fed. Rep., 811; and it was upon this view of the facts of the case that the order made was affirmed on appeal, November 7, 1897,—so recently that the latter opinion has not yet been reported.

The circuit court, however, took occasion to express this view of the law: "No one can question the right of the defendants to refuse to purchase machine-made packages, or of goods packed in them, or, by fair means, to persuade others from purchasing or using them. If that is all that is implied by a boycott, as insisted by defendants,it is difficult to see where they violate any law, although it might injure the complainants' business. *It has been decided, however, that while such action would not be unlawful by an individual, a combination or conspiracy to accomplish the purpose would be an unlawful act.*" (72 Fed. Rep., at 698). Arthur v. Oakes, 63 Fed. Rep., 310, is supposed to warrant this statement. Yet that case turned upon the precise distinction between a combination acting "*so as*" to injure another, and one whose *sole or real purpose was to maliciously injure without cause or excuse;* and the distinction thus established stamps the conclusion that a combination for a lawful end by lawful means is an illegal conspiracy, to be fundamentally erroneous (Consolidated Wire Co. v. Murray, 80 Fed. Rep., at 828).

This distinction was carefully observed by the Circuit Court of Appeals in affirming Oxley Stave Co. v. Cooper's Union, *sub nom.*, Hopkins v. Oxley Stave Co., Nov. 7, 1897. It was there said that "while the courts have *invariably* upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, *either singly or in a body*, even where such withdrawal involves a breach of contract (citing Arthur v. Oakes, 63 Fed. Rep., 310), yet they have very generally con-

demned those combinations usually termed boycotts, which are formed for the purpose of interfering *otherwise than by lawful competition* with the business affairs of others and depriving them *by means of threats and intimidation* of the right to conduct the business in which they happen to be engaged according to the dictates of their own judgments. * * Persons engaged in any service have the power, with which a Court of Equity will not interfere by injunction, to abandon that service either singly *or in a body* if the *wages paid* or the conditions of employment are not satisfactory." It was said that whether it be true that many may not combine to do what an individual can lawfully do *depends upon circumstances, i.e.*, the elements of *malice, without just cause or lawful excuse*; of the nature of the *means* resorted to; and whether *third persons*—strangers to the controversy—are undertaken to be coerced (in a legal sense) by the use of unlawful means. The above quoted paragraph from the opinion of the circuit court is substantially condemned by the appellate court, and it is to be noted that the latter cited Arthur v. Oakes, for the precise *converse* of the proposition which the circuit court had construed it to hold.

A casual glance at the books will disclose that Lord ESHER is generally (and properly) regarded as holding views of the extremest character upon this general question. His charge in Reg. v. Bunn, 12 Cox C. C., 316, was overruled in Gibson v. Lawson, 1891, 2 Q. B., 545, 560, and he was the only dissenting judge in Mogul SS. Co. v. McGregor, 23 Q. B. D., 598. In both instances, however, he clearly recognized the right of persons engaged in an occupation to associate themselves for their mutual advantage. He also wrote the much canvassed opinion in Temperton v. Russell, 1893, 1 Q. B., 715. And yet that very learned and experienced judge (as Lord Justice BRETT) was careful to say (as indeed he had previously declared in Reg. v. Bunn, *supra*), and under circumstances of the utmost gravity,

that "*it is not, of course, every agreement* (between two or more persons to accomplish a certain end by concerted action) *which is a criminal conspiracy.*"

Reg. v. Aspinall, 2 Q. B. D., 48, 59.

The distinction between injury as *the result or consequence* of given action by another, and damage proximately caused by a combination entered into for *the sole or real purpose of maliciously wronging another* without lawful excuse, is as fundamental as it ought to be elementary.

Day v. Brownrigg, 10 Ch. Div., 294, 303;
Rogers v. Rajendso Drutt, 13 Moore, P. C., 209;
Ratliffe v. Evans, 1892, 2 Q. B., 524, 527.

d. Holding the views it had expressed in Oxley Stave Co. v. Coopers' Union, *supra*, it is not difficult to understand why the circuit court adopted the general statements in the complainants' affidavits that Greer, Mills & Co. had been "boycotted" as *proof conclusive* of a conspiracy.

It is to be observed that these allegations are *mere conclusions.* They constitute no evidence of the fact. To make such proof it is necessary that a statement of *facts* shall be made and shown from which the Court can pronounce that a "boycott" is disclosed. That word has become quite as much a term of art as are "fraud," "damage," and others which the law uses. One cannot say generally that he has been defrauded or damaged, but he must show a state of facts which, in law, warrant the conclusion asserted.

1 Whart. Ev., § § 507, 509.

"The correctness of the ascription of a purpose to the parties" depends upon *language used or acts done*, and cannot be covered by statements of *legal conclusions* or of an *argumentative nature.*

Dillon v. Barnard, 21 Wall; 430, 437;
United States v. Ames, 99 U. S., 35, 45;
Pullman Car Co. v. Mo. Pac. R. Co., 115 U. S., 587, 596;

Fogg v. Blair, 139 U. S., 118, 127.

Epithets and conclusions are to be discarded in determining whether a case has been made out.

Kent v. Canal Co., 144 U. S., 75, 91;

Chicot County v. Sherwood, 148 U. S., 529, 536.

e. Besides, *there is no allegation of a "boycott" in the bill*; consequently, a consideration of the element was wholly without the province and jurisdiction of the Court. (11 Wheat., at 189; 10 Wall., at 303). Indeed, as hereafter shown, a mere *private* "boycott," however reprehensible, could not be made the basis of a public action.

f. In striking contrast to the statement that the defendants aspired to a monopoly is the finding that "it appears from the testimony that any person or partnership attempting to carry on business independent of the association, *is invited to apply for membership!*"

Even if "the manifest intent of the association is to induce all those engaged in the same occupation to become members of it, *such a purpose is not unlawful.*"

Comm. v. Hunt, 4 Met., 111, 129.

It is established law that the associates may use all lawful purposes to that end; and that mere withdrawal of business fellowship is not unlawful.

Macauley v. Tierney, 33 Alt. Rep, 1; 19 R. I., ——.

g. That a non-member competitor cannot prevail against "the combined opposition of three hundred men" does not prove the associates to be criminals. Upon the same theory every successful competitor can, because of his success, by reason of his association with others, be characterized as a wrong-doer. On the contrary, as "the effort of all competitors is to drive out competitors," (70 Fed. Rep., at 388), the success of the effort cannot be a crime!

h. The statement that the object and purpose, "written across the face of the Exchange where all can read," were "to control and monopolize the entire

business of buying and selling live stock at the Kansas City Stock Yards" is wholly unwarranted. The Exchange, as such, *is engaged in no business of any kind whatever*; its rules "are merely machinery for bringing the two parties (principal) together" (L. R., 6 Q. B., at 327; 67 N. Y., at 142), and its members do not *buy* and *sell*, in the sense of dealers or owners. On the contrary, they are merely exercising *a private occupation*, a matter so plainly distinct (Morris v. Colman, 18 Ves., 437), that it is "written across the face" of every law book on the subject. (Union Stock Yards Bank v. Gillespie, 137 U. S., 411, 415, 419). Hence, it is that "*that class* of trade or commerce"—the buying and selling of live stock—is not restrained or monopolized by the Exchange or its rules, (86 Tex., 250), but it is encouraged and promoted to a greater extent than by any other adjunct or agency known to human ingenuity.

The ambition or desire to act as commission merchants in every instance in which an owner concludes or finds it to his interest to employ one, embodies the commendable aim of every industrious man engaged in an occupation, and the right to entertain it and to succeed in reaping the fruits of success cannot be declared to be unlawful, however great the resulting loss to others. (143 Ill., 210, 234).

i. It was admitted that "possibly" the regulations of the Exchange "are all reasonable and fair and for the best interest of buyer and seller," but this was followed by a series of suggestions which would amply justify the defendants in complaining of unfair treatment, were they so disposed, (Record, 269.)

What right has the stock-grower, the purchaser, or the public, to demand that traveling agents shall visit them, or to object to a limitation as to the number of *solicitors* to be employed in a private occupation, or to require that *prepaid* telegrams shall be sent? What harm done by the rules on the subject? As these

rules embody the unanimous compact of the members, who shall say that they are unreasonable or harmful to trade? (143 Ill., 210, 233, 234; L. R., 4 C. P., 36, 48.)

It was wholly unwarranted to remark that the rates of commissions had been *raised*, even doubled, since the organization of the Exchange in 1886. On the contrary, the silence of the bill on the subject is of itself conclusive that there is no room for complaint in the premises, and the proof is uncontradicted that *identically the same rates* had prevailed at Kansas City for fifteen years before the Exchange was formed and (then and ever since) at all other live-stock markets.

The rebuttal affidavits disclose that formerly a system of *secret rebates* and of discriminations in favor of large shippers had been practiced. But are we to be told that when so odious and reprehensible a practice has been suppressed by legislation, or by the rules of an Exchange, the public has been injured? (People v. Fire Underwriters, 7 Hun, 248, 251, 252.) Or, that if such a practice is found to bring a market, or an occupation, into disrepute, or to move non-favored shippers into sending their consignments elsewhere, that those interested in building up the market and in maintaining the confidence of the public that the same treatment will be accorded to all patrons, be they large or small, rich or poor, friends or strangers, must sit supinely by and be debarred from taking steps to remedy the great and growing evil?

And why criticize Section 8 of Rule IX. as involving a discrimination in favor of a few localities and denounce it accordingly, and in the same breath mandatorily enjoin the practice of a *much more extensive discrimination* throughout "the whole field of operations," covering many States and Territories?

But, as already said, it was wholly inaccurate to say that under the existing rules there were "discriminating charges on stock from different localities." The clause referred to (section 8 of Rule IX.), merely regulates the

matter of *dividing commissions with non-resident commission merchants* on stock shipped to Kansas City from certain other and competing markets. Such division involves no element of discrimination; on the contrary, it serves to attract consignments and thus to the promotion of trade.

Scott v. Lloyd, 19 Colo., 401;

McLaughlin v. Barnard, 2 E. D. Smith, 372.

Indeed, why could not a so-called discriminating schedule be adopted, by which shippers who are located so as to have the choice of many markets would be induced to select Kansas City? What wrong would there be in this to those whose situation was materially different? Must the defendants forego the opportunity to sell Illinois cattle because if the commissions are the same the owner will ship to Chicago or St. Louis? While no such regulation has been made, many trade reasons would justify a provision on the subject.

Merchants' Bank v. Pennsylvania, 167 U. S., 461, 463.

j. Answering the showing of the defendants that Exchanges have been demonstrated to be "*essential, if not indispensable, to the business interests of the country*," and the argument of their counsel that a decree for the Government, as prayed, "would be *a death-blow to these institutions*," the circuit court, conceding that it could not shut its eye to the result of its conclusions, said that *it was not necessary to discuss how far these considerations should control its action.* To the contrary of this ruling, such a showing and argument demonstrate, 1, that such bodies cannot possibly be in restraint of or injurious to trade; and, 2, the considerations mentioned are of *decisive influence* in construing an Act of Congress designed to benefit, and not to injure, the trade or commerce of the United States, (143 U. S., 457, 472; 162 U. S., 197, 218, 219; 62 Fed. Rep., 914, 918.)

k. It was then said that it might be admitted that

Exchanges were beneficial "to the members and, perhaps, *to the locality*" where they are situated.

It is difficult to understand how members whose ability to earn a livelihood depends entirely upon the result of their efforts to encourage and facilitate trade can be benefited without a corresponding advantage to the trade thus promoted; and utterly impossible to appreciate that it is *an advantage to a given locality* that an Exchange should exist in its midst *but injurious to the country at large.* Indeed, the very fact a great local market is thus built up is proof conclusive that the tributary territory is correspondingly benefited, for it is *that territory* which reaps the advantages of such a market, (KELLY, C. B., in Grissell v. Bristowe, L. R., 4 C. P. at 53; Lord BLACKBURN in Speight v. Gaunt, L. R., 9 App. Cas., at 21; La Marchant v. Moore, 44 N. E. Rep., 770, 772; Skiff v. Stoddard, 63 Conn., 198; Rosenstock v. Tormey, 32 Md., 169, 177).

Logically, the suggestion would make it impossible *to build up large cities*, and means that an agency cannot benefit commerce unless it is *actually physically present* upon every inch of territory within the limits of which its influence is felt!

The narrow view of a local benefit only, is strikingly at variance with the statements at another page of the opinion that the "defendants are *active promoters;* * * they reach out over *many States and Territories*, by their solicitors and advertisements, and gather in for sale *millions* of cattle, sheep, and hogs, and their rules and regulations cover the *entire business*, and extend over the *whole field of operations;*" from which it necessarily follows that the influence of those rules, for good or evil, must be as extensive as the field referred to.

l. The necessity of having properly conducted agencies for the marketing of articles of commerce was fully admitted, subject to these limitations:

1. Such an agency "should not be permitted to

tamper with or in any way impede or restrain the natural flow of industry or commerce;"

2. Heed should be given to "the crying complaint of to-day" that the tendency of wealth is to monopolize the products and industries of the country; and

3. Many of the so-called Stock and Produce Exchanges are being used for *gambling purposes.*

The first limitation assumes the very point in controversy: whether Exchanges do *impede* and *restrain* the transaction of commerce.

As to the second, the observation of the circuit court seems to have led it to confound the assumed tendency of wealth to form "trusts" with the operations of the assumed and denounced stock and grain gamblers. The persons in question are *not the same* and their respective aims are *wholly at war.* However, neither their status nor their objects are at all pertinent in this case.

The proof shows that the occupation of commission merchants at the Kansas City Stock Yards has never yielded a competency, much less a degree of wealth constituting "a menace to the welfare of the people," to a single member of the Exchange. The security afforded by their rules, their high standing in financial circles, and the confidence that through their Exchange mortgaged live-stock will always be advantageously disposed of, and the proceeds honestly accounted for, doubtless unite to enable them to provide, by discount and borrowing, the loans mentioned in the bill as having done so much to build up and maintain "a great and growing market." In all probability, some of the members are possessed of a greater or less amount of capital which they can thus loan. But which of these circumstances involve any public injury or restraint of trade?

What bearing gambling (if any there be) at other Exchanges, of which the circuit court took judicial notice, can possibly have on the present case, is not perceived. Certainly, the only transactions ever had at these yards consist of *actual sales and physical deliv-*

eries. Indeed, the rules of nearly every reputable Exchange peremptorily forbid mere Option dealings.

Bibb v. Allen, 149 U. S., 481, 491, 493.

In a most recent case, a learned court, whose observation and experience in such matters have necessarily been exceedingly great, declared, speaking of this very subject: "There are *so-called* Exchanges or offices in many cities in which some persons assume to speculate" in such a way as to constitute gambling, but dealings on "a *regular Exchange*" evidence "*legitimate and lawful business*," to such an extent that by means of the records kept and reports published by the organization any departure from its inhibitions against irregular dealings, is readily disclosed.

Prout v. Chisholm, 47 N. Y. Supp., 81 N. Y. State Rep., 376, 379, 380, 381.

So in Skiff v. Stoddard, 63 Conn., 198, 206, it was found that "the rules of the New York Stock Exchange require that all sales made by brokers belonging to said Exchange shall be actual, *bona fide* transactions." Also, Harvey v. Doty, 27 S. E. Rep., 943, 946.

At its 1872 meeting the National Board of Trade, by resolution, expressed "its *decided disapproval* of a system which substitutes reckless gambling for fair dealing" and urged "upon the commercial organizations of the country the making of such rules as will cure the evil." (Report, 1872, p. 116).

Twenty years later, one of its members, during a discussion of proposed Anti-Option legislation, boldly asserted: "I say this—and *I defy any man to dispute it* —that there are no transactions on any Boards of Trade in the United States that do not represent, and which must not be paid for by, the *actual property* represented by the transaction." (Report 1892, p. 223.)

The Supreme Court of Missouri, in 1893, reviewing the course of business on the Kansas City Board of Trade, found the facts to be (the italics being from the opinion) "*that Kansas City was not in any sense a*

speculative grain market. That although it had become one of the great grain markets of the world, it was so in the *actual* receipts and sales and shipments of grain, etc."

State *ex rel.* Attorney-General v. Smith, 114 Mo., 180, 191.

"There are no such things as time bargains on the Stock Exchange."

LINDLEY, L. J., in Thacker v. Hardy, 4 Q. B. D., at 689;

Ex parte Grant, 13 Ch. Div., 667, 671.

"Such bargains are practically unknown on the Stock Exchange where contracts for the payment or receipt of differences are never made."

Melsheimer, Stock Exchange, 31;

Bisb. & Sim., Produce Exchanges, §212.

The broad assertion of the circuit court is contradicted by the earnestness with which typical Exchanges have contested the efforts of "bucket shops," and other irregular institutions, to obtain their quotations. (15 Fed. Rep., 849; 17 Fed. Rep., 825; 22 Fed. Rep., 23.)

It is to be noted that the anathema of the circuit court was explicity limited to that class of dealings which "the courts have *uniformly condemned*," and which "is under the *ban of the law.*" Hence, it cannot be said that the district judge merely utilized the occasion to express, *obiter*, his personal unoffiicial views upon the subject of contracts for future delivery. His language is not susceptible of such a construction. Being a "thoughtful observer" (Record, 270,) he must be taken to have known that such contracts are *not illegal* (Irwin v. Williar, 110 U. S., 499; Bibb v. Allen, 149 U. S., 481, 492; Hanson v. Boyd, 161 U. S., 397, 406); that Congress has repeatedly refused to legislate in antagonism to such dealings; that "the fact that speculation was the object *is of no legal importance whatever*" (COOLEY, J., in Gregory v. Wendell, 40 Mich., at 437); and that the law does not permit a court to declare a

gambling intent *in the absence of proof*, the presumption being against such an intent (Mr. Justice BREWER in Bangs v. Hornick, 30 Fed. Rep.,at 99).

With due deference, the circuit court ought to have adopted the eminently proper reply of Lord BRAMWELL (4 Q. B. D., at 692,) when such an argument was pressed upon him: "THAT IS NOT THE POINT WE HAVE TO CONSIDER."

Clarke v. Foss, 7 Biss., 540, 547, 548, 553, 555; affirmed on appeal, Ward v. Vosburgh, 31 Fed. Rep., at 15; approved as being a "most full and exhaustive discussion." (Gilbert v. Gauger, 8 Biss., at 218); and supported by the conclusion reached in Hansen v. Boyd, 161 U. S., 397, 405, 408.

The briefs below indicate that the sources of information relied on for these statements were a published interview with Gov. Tanner of Illinois and an extract from one of Bulwer's novels. The Trust Act may be sweeping in its provisions, but it is a startling proposition that it was intended to reach gambling or even illegal option dealings, and, if possible, even more so that it has transformed *actual* sales and deliveries of *lawful* commodities into mere *wagers*. These criticisms are not only exceedingly unjust, but, especially when falling from a Federal bench, they are much calculated to arouse a wholly unwarranted prejudice against institutions in the absence of which our country would, in in all probability, cease to be a trading community or a commercial factor. (Bisbee & Simonds, Produce Exchanges, Preface, VI.)

m. The court then construed the Trans-Missouri case to hold that commerce is to be permitted "to flow in its natural channels, unrestricted by any combinations, contracts, or conspiracies, or monopolies, whatsoever."

It is to be observed that *when commerce is done by means of the facilities provided by an Exchange*, invoked by the persons engaged in such commerce, IT IS DECIDEDLY FLOWING "IN ITS NATURAL CHANNELS." For, as

has been said in many of the cases and text books, cited *supra*, practically all the trade, in America and in Europe, in given commodities, is thus carried on; and experience, and the consensus of mercantile opinion and of the views of political economists and thoughtful statesmen, concur that an interference with such bodies would mark the severest blow to commerce which the ingenuity of a commercial rival could possibly inflict.

n. It is a striking fact—and particularly so because the entire scope and tenor of the opinion were dominated by a manifest spirit of deep hostility—that no word of criticism is to be found in respect of the right to agree upon a *schedule* of *commissions* to be observed by members of the association.

The Order of Injunction Considered.

The order of injunction which this Court is called upon to review is, if possible, even more vulnerable to criticism than the opinion filed in its support.

Primarily, it is to be noted that the order goes far beyond the terms of the opinion, and, in several important particulars, it adds to the scope of the bill and its prayer.

a. The defendants are enjoined "from combining by contract, agreement, or understanding, express or implied, So as by their acts, conduct or words, to interfere with, hinder, or impede others in shipping, trading, selling or buying live-stock, &c." As was said in Arthur v. Oakes, 63 Fed. Rep., 310, 317, 318, where the very words "*so as*, etc." (313, 317) were the basis of the reversal, such a clause embodies *the quintessence of slavery!* The idea that American citizens cannot, by way of an implied understanding, or even express contract, carry on their business *so as* to impede a competitor would ordinarily be unhesitatingly stamped as a monstrous suggestion. What mercantile partnership is not

open to the same injunction? (Planters' Compress Co. v. Ireys, 16 South. Rep., 386).

Considering the situation before the court, the clause can have practical application only to competing commission merchants, or, to be specific, to Greer, Mills & Co. It is not limited to a combination whose *sole or real purpose is to maliciously injure another without just cause or excuse*, or to a conspiracy to use *unlawful means*. And in the absence of such an element, the order is violative of fundamental rules of law and of constitutional guaranties. The suggestion that *the exercise of a lawful right by lawful means* can be enjoined because the result or consequence,—as distinguished from a purpose to accomplish the same end from malice and without the justification of a lawful self-interest, or by a resort to unlawful means,—may prove to be an impediment to some other person, and especially when that other person is a competitor, is without a parallel in civilized jurisprudence. The discussions in Toledo Ry. Co. v. Pennsylvania Co., 54 Fed. Rep., 730, 738; Arthur v. Oakes, 63 Fed. Rep., 310; and Continental Ins. Co. v. Fire Underwriters, 67 Fed. Rep., 310, to say nothing of the multitude of other cases on the same subject, leave no room for doubt in the premises.

b. The defendants were also broadly enjoined from enforcing, recognizing or acting under either Rule IX. or Rule XVI., and each and every section thereof and any and all amendments thereto.

It is thereby asserted to be *per se* and conclusively unlawful for persons engaged in a private occupation to agree on a schedule of wages or commissions, or concerning the manner of conducting their occupation in respect of solicitors or prepaid telegrams, or that they will not "transact any business with any person violating any of the Rules and Regulations of their Exchange, or an expelled or suspended member."

The making of an agreement to these ends is not

only the exercise of a lawful right but the right is sanctified by a constitutional guaranty. That a schedule of wages may be agreed on and adhered to has been declared to be so clear that it is strange that any one should ever have doubted it. Such an agreement cannot be adjudged to, of itself, restrain trade. Whether it does so in any case must depend upon superadded conditions, in respect of the public character of the associates, or of a resort to unlawful means, none of which are pleaded or proved in this case or carried into the decree.

To deny the right to refuse to deal with another is but another way of *compelling* the party enjoined to deal with persons against his will, and, when the matter involved is one of private personal service, such a decree is, in the language of Arthur v. Oakes, not only violative of natural liberty, but also marks a return to the state of slavery which the Thirteenth Amendment has hitherto been supposed and hoped to have forever exterminated on American soil. (See, also, 114 Mo., at 199, 200). Here, although a person may have been expelled for the *grossest fraud* or *most flagrant dishonesty*, a mere refusal to deal with him is declared to be a crime and involves a contempt of court!

c. In line with this mandatory provision is a further injunction against the enforcement of any fines or penalties upon *members of the Exchange* for trading or offering to trade with any person whatsoever, etc. It is conceded even in the extreme case of Temperton v. Russell, 1893, 1 Q. B., 715, that the associates "had a perfect right to do this so as to bind *their own members* and they had a right to *insist on obedience* to their rules from such members."

d. Discrimination in favor of members because of membership, "and especially from in any manner discriminating against any person," (without regard to the reason therefor, whether good or bad), are also enjoined. (61 Ill. App., 349.) This strongly emphasizes Dr.

Wharton's sage conclusion that given notions of the law will transfer the regulation of mercantile matters to the *criminal* courts; for it must be borne in mind that nothing can be enjoined under the Act of Congress unless it constitutes a crime under section one or two.

e. A refusal, "by united or concerted action, or by *word, persuasion*, threat, or *other means*, (even if it be mere individual action), to deal with persons who are not members, because of such non-membership" is also enjoined.

There is no allegation in the bill or evidence in the case of a *threat* by a single defendant, as that word is defined by all the cases. And the right to act by "word, persuasion, or other means," (for the element of *unlawfulness* of means is studiously omitted), has been conceded even in the cases where the provocation to extend the established rule was exceedingly flagrant. (54 Fed. Rep., at 738; 62 Fed. Rep., at 820; 67 Fed. Rep., at 711; 80 Fed. Rep., at 828; 82 Fed. Rep., at 42). The apprehension of a member that by violating Rule XVI. he will endanger his membership does not prove that he has been made the victim of unlawful means (Quincey v. White, 63 N. Y., 370, 376).

f. Nor may the defendants and each of them, "collectively or otherwise" (individually), in any manner interfere with the right and freedom of all persons to deal at said Stock Yards, "*the same as if such Exchange did not exist.*" That is to say, if any defendant interferes "in any manner," even by exercising a *lawful right* in a *lawful manner*, to-wit: because he does not choose to deal with a party; because the business methods of such party are detrimental to the best interests of the market; because the party is disreputable or insolvent; because the defendant's own interests in life, his "just cause and excuse," move him to such refusal; because competition, as he sees it, *necessarily implies interference with a competitor*; because he has agreed, upon a valuable consideration,

not to thus deal (Dos Passos, Stock Exchanges, 40, 43-45); or for any other similar reason, or for no reason at all,—in either event, he is conclusively guilty! If this be the law, no one has ever before so said; and certainly the Trans-Missouri case does not decide it.

g. The next clause of the injunction specifically enjoins any agreement whatever, directly or indirectly, fixing commissions, or limiting the employment of solicitors or the sending of prepaid telegrams, matters already adverted to.

h. The order of injunction must impress one, as does the opinion, that this case was treated to be *in form*, (what the Record shows it to be *in fact*), a suit by Greer, Mills & Co.—who are conceded to have been lawfully suspended from membership because of the non-payment of a fine properly assessed against them in accordance with the rules, (Greer v. Stoller, 77 Fed. Rep., 1),—for the purpose of reinstating a membership thus adjudged to have been voluntarily surrendered and lost by their own misconduct. The order of injunction proceeds on no lines of public interest. Indeed, if the same rules were generally applied, probably not a single association of persons, mercantile or professional, in these United States would survive, and certainly it would be difficult to discover wherein an American citizen differed from the *serf* or *vassal* of the Dark Ages.

Mogul Steamship Co. v. McGregor Considered.

The view taken below that *all* the cases declaring or recognizing *any* of the rules of law or statements of historical experience which are recorded in the exhaustively considered opinions in Mogul S. S. Co. v. McGregor, 21 Q. B. D., 544; 23 Q. B. D., 598; 1892, App. Cas., 25, or which have since approvingly referred to that case, are henceforth to be deemed erroneous in the Federal jurisdiction, prompts a brief notice of what Judge McKenna has declared,—"from the distin-

guished character of the judges and tribunals who decided it, and the consideration it received, and its approval by American cases,—must be regarded as *high authority*." (67 Fed. Rep., at 314.)

Primarily, it is to be noted that Lord ESHER distinctly recognized that even his dissenting views did not apply to a case of an association by persons engaged in *a mere private occupation* (23 Q. B. D., at 609), as these defendants are; so that the remarks of this Court concerning that citation (166 U. S., at 334, 335), might be safely passed by as being equally inapplicable to the present controversy, even if such an Exchange as this is to be judged by the rules applicable to associations of persons generally. And it is not to be understood, because of this reference to that case, that the appellants concede that their defense must be judged accordingly as the conclusions there announced are deemed to be correct or erroneous, in whole or in part. The importance of the general question of the proper scope and construction of the Act of Congress of July 2, 1890, is believed to justify a seeming diversion, in the interest of the symmetry of the law, and, perchance, to avert a repetition of the misconception of the views of this Court upon the subject which has been so extensively entertained in respect of the Trans-Missouri case.

The only real bearing which the McGregor case had upon the case then before this Court was as an instance of an association between carriers, charged with a public duty, for the purpose of fixing rates, and the criticism of this Court was carefully limited to so much of what was said in that case as could properly be declared to have been displaced by the statute under consideration. The vice of the Trans-Missouri Freight Association was found to be that its rules evidenced a *contract in restraint of trade*. That phase of the matter was but incidentally alluded to in the McGregor case, and then only for the purpose of

criticising the statement of CROMPTON, J., in a previous case, that such a contract was illegal in the sense that it was a criminal conspiracy to enter into the same. No one pretended that the Freight Association was a *conspiracy*, nor, indeed, that it was or tended to a *monopoly*. So far as the element of agreeing on prices or the rates to be charged by parties engaged in trade or commerce (at least when charged with a public duty) is concerned, the matter if unlawful, is one of *contract* or *combination*. But when it is asserted that certain action has been taken to the injury of another, *ex. gr.*: violence, threats, intimidation, or a "boycott" resorted to, whereby trade has been restrained, the guilt of the defendants must depend upon whether a *conspiracy* is shown. The former is a matter of *contract;* the latter of *tort*. It is precisely as if the statute read "whoever shall restrain trade by means of a contract, or a tort, shall be guilty, etc." When tortious action is relied on to prove a violation of the Act, such action must, self-evidently, involve, *a*, a *tort*, and, *b*, a *conspiracy* to commit or consummate the same.

United States v. Debs, 64 Fed. Rep., 724, 747, 748.

Whatever other changes in the law may be said to have been wrought by that Act, it is clear that it has not undertaken to revolutionize the essential and fundamental characteristics of a *conspiracy* nor to declare action, which is otherwise incontestably lawful, to constitute a *tort*. It is still necessary to a conspiracy (to use Lord DENMAN'S antithesis) that (at least) the purpose of the associates was to accomplish a wrongful end or to resort to unlawful means (Wright Crim. Consp., Carson's ed., pp. 48-52). To illustrate, when it is asserted that a lawful association, *i. e.*, a corporation formed under a State statute, for lawful business purposes (Bibb v. Allen, 149 U. S., 481, 489), not charged with a public duty, has assumed such an attitude towards a person bent on sharing all the ad-

vantages of that commercial club without being a member thereof, or content to bear any of the obligations of membership, and, because his demands are not slavishly acceded to, thereupon determined to overcome the associates by a course of conduct at variance with their rules and (if successful) destructive of their organization,—~~that it~~ has become converted in a *conspiracy* under the Act of Congress, is it not essential that *some other element* shall be disclosed? Would a charge to a jury that upon this assumed state of facts the defendants were conclusively guilty be sanctioned by the law, not to mention constitutional guaranties? Would Arthur v. Oakes, 63 Fed. Rep., 310, be condemned and overruled? Doubtless it would be said that a mere association was not *per se* criminal, and, with equal emphasis, that the act of the defendants in merely assuming an attitude indicating a refusal to permit their assailant to succeed, or an endeavor to crown their own efforts with success, did not prove a conspiracy. It is believed that the rules by which it is to be determined what superadded elements are essential to convert such an association (perhaps, a State corporation, or one organized under the Federal statute of July 29, 1886, 24 Stat. L., 86), into a criminal conspiracy, even under the Act of July 2, 1890, are most clearly collated and firmly established in and by what was said in various portions of the opinions in the McGregor case.

It is ventured to thus summarize the rules of law and the suggestions of a practical nature to which reference is had *supra:*

A ruling that the presence of a commercial interest is evidence of a malicious purpose "would be to convert into an illegal motive *the instinct of self-advancement and self-preservation*, which *is the very incentive of all trade.* * * To say that a man is to trade *freely*, but that he is to *stop short* at any act which is calculated to *harm other tradesmen* * * would be *a strange and impossible counsel of perfection*," and to undertake

to judicially determine what competition is unduly burdensome to one of the competitors "would impose *a novel fetter upon trade*," (BOWEN, L. J., 23 Q. B. D., at 615, 616, 618). "The success of one must be the failure of the other," (FRY, L. J., 23 Q. B. D., at 626), a doctrine which *necessarily follows* from the policy that competition shall be encouraged, (626, 629). If mere injury as a result of competition, or of steps taken by others for self-protection, or self-advancement, is to mark an actionable wrong, then "*all competition must be unlawful*," a view which Lord Chancellor HALSBURY emphatically characterized as "a sufficient *reductio ad absurdum* to dispose of that head of suggested unlawfulness," (1892, App. Cas., at 36, 37). The right of persons to associate for the purpose of protecting themselves is, in truth, sanctioned by the policy of *freedom of trade*, (Lord BRAMWELL, at 47; Lord MORRIS, at 50). "The object of every trader is to procure for himself as large a share of the trade he is engaged in as he can," (Lord HANNEN, at 58). So, the mere fact that a number agree to act in concert, however potent the influence they are thereby enabled to exert, and however great the harm which may be done to a competitor, involves no legal wrong. Where the motive is the advancement or protection of their own commercial interests, there is present the element of just cause or excuse, and consequently and necessarily a negation of the essential ingredient of mere personal malice, (Lord COLERIDGE, 21 Q. B. D., at 549, 552–554; BOWEN, L. J., 23 Q. B. D., at 613, 614, 615, 616, 617, 618; FRY, L. J., at 625; Lord Chancellor HALSBURY, 1892, App. Cas., at 40; Lord MORRIS, at 49; Lord FIELD, at 57; Lord HANNEN, at 59, 60). A different doctrine would logically transform every *partnership or mercantile corporation* into a criminal conspiracy, (BOWEN, L. J., 23 Q. B. D., at 617; Lord Chancellor HALSBURY, 1892, App. Cas., at 38). That third persons are put to a choice whether they will deal with one of the associates or with their competitors involves

no element of restraint of trade or of unlawful means, (Lord WATSON, 1892, App. Cas., at 43).

The cautionary ruling of Lord ESHER, already adverted to, that a case involving a *mere occupation* is to be judged by wholly different rules from those he there advocated,—that is to say, their right to agree to act in concert to secure conformity to an agreed schedule of wages or commissions, or to refuse to have business intercourse with those who do not belong to or who refuse to join the association, is indubitably clear, or, Lord ELDON put it, "*the case of trade is perfectly distinct*,"—is in 23 Q. B. D., at 609.

The prominence given in the opinion to the private rights of Greer, Mills & Co. and the fact that the order of injunction is almost exclusively devoted to placing that firm in the same position it would occupy if all its constituent partners were members of the Exchange in good standing, thereby annulling the suspension upheld in Greer v. Stoller, 77 Fed. Rep., make it proper to consider:

XI.

MATTERS CONCERNING WHICH THE ATTORNEY-GENERAL CAN SUE.

PRIVATE WRONGS AND CONTROVERSIES CANNOT BE CONSIDERED IN THIS CAUSE.

I. The pending bill presents no allegations of a malicious intention to injure Greer, Mills & Co., without just cause or excuse, in the way of a combination to "boycott," or otherwise on the part of the defendants, individually or collectively. Hence, any attempt to sustain the action by proof of such a wrong must be passed by as irrelevant to any issue within the jurisdiction of the Court.

"The accompanying affidavits cannot and do not enlarge the cause of action alleged." (1 Beach, Injunctions, p. 141, *n.*)

Conforming to "rules which have been established for ages on the soundest and clearest principles of general utility" (Mr. Chief Justice MARSHALL in Crockett v. Lee, 7 Wheat., 522, 527), these propositions have been announced as being axiomatic:

"The maxim that a decree must be sustained by the *allegations* of the parties, as well as by the *proofs*, is too well established to be disregarded."

Carneal v. Banks, 10 Wheat., 181, 189;
Pratt v. Vattier, 9 Pet., 405, 415;
Jackson v. Ashton, 11 Pet., 229, 249;
Knox v. Smith, 4 How., 298, 317.

"A party can no more succeed upon a case *proved* but *not alleged*, than upon a case alleged but not proved.

Foster v. Goddard, 1 Black, 506, 518.

"Averments without proofs and proofs without averments are alike unavailing."

Washington R. Co. v. Bradleys, 10 Wall., 299, 303.

"The decree of a court of equity upon oral allegations, without written pleadings, would be *an idle act*, of no force beyond that of an advisory proceeding of the chancellor."

Windsor v. McVeigh, 93 U. S., 274, 283.

And if such a tort on the part of *individual members* were alleged and proved, liability therefor could, self-evidently, not be charged against the organized body, nor against any member thereof not assenting thereto.

2. In any event, however, under the facts of this case, such a wrong would not be a public one which can be enjoined or punished by an equitable proceeding instituted, in form, by the United States: it would be a merely *private wrong* against the individuals who were the objects of the malice referred to. These individuals must appear as the plaintiffs of record.

The precise question was considered and directly

decided in a case presenting a most extreme state of facts.

Findlay v. McAllister, 113 U. S., 104, 110, 111.

It is, of course, not denied that the United States can sue in equity to assert *the general welfare of the whole people* in matters of interstate commerce covered by the Act of 1890. But so far as any *private right* of Greer, Mills & Co., is concerned, there is no such power, nor could it constitutionally be conferred.

If the matter wears a criminal aspect, the accused have a constitutional right to a trial by jury. The Attorney-General cannot be heard in such a proceeding unless it appear that a public interest, in the legal sense, is involved, a rule which has particular weight in the Federal jurisdiction. If it appears that the motive of the action is private malice or a desire for vengeance, or its object the protection of a private right, the suit must be dismissed. The element of private instigation is accorded particular weight in determining whether an interlocutory injunction should be issued.

These principles are well established and sustained by a wealth of authority:

a. Before the United States can sue it must be shown that they have a substantial interest in the premises, either pecuniary, or in the discharge of a duty to protect the welfare of the *general* public, (as distinguished from mere private interests on the part of individuals).

United States v. San Jacinto Tin Co., 125 U. S., 273, 285, 286, 308.

This question was most exhaustively considered in United States v. Debs, 64 Fed. Rep., 724, and *In re* Debs, 158 U. S., 564. It was admitted on all hands, and this Court distinctly ruled, although it was boldly avowed by the defendant that his precise purpose was to *maliciously injure* and to "boycott," not only the Pullman Company, but also a large number of railroad companies, (with whom the strikers had no other con-

troversy), for the sole reason that *they would not break valid existing contracts* with the Pullman Company,—"that it is not the province of the government to interfere in any mere matter of *private controversy between individuals*, or to use its great powers to enforce *the rights of one against another*," (158 U. S., at 586.) "The difference between a public nuisance and a private nuisance is that one affects *the people at large* and the other *simply the individual*." (592, 593.)

"It is not sufficient for the people to show that wrong has been done some one; *the wrong must be done to the people in order to support an action by the people for its redress.* The suit now before us seems to have been instituted on a different theory. It sets forth various acts as wrongful, which, if wrong, affect no public right. These wrongs are wrongs *to individual citizens*, and not to the State, and are remediable *at the suit of the parties injured only*."

People v. Albany etc. R. Co., 57 N. Y., 161, 167, 168, 171.

b. This rule is not changed by section four of the Act of July 2, 1890. Under established principles, and in view of the Constitution, nothing can be asserted by force of that section unless the same cause of action, (so far as this feature of the case is concerned), was remediable by a public action under the rules governing the jurisdiction of the Chancery Courts, at the time our Constitution was adopted.

United States v. Debs, 64 Fed. Rep., 745, 753.

In other words, while a conspiracy whose real purpose is to maliciously injure another without just cause or excuse, may constitutionally be declared to be a *crime* (United States v. Pettibone, 148 U. S., 197), yet in a prosecution therefor there is a guaranty of *trial by jury* which Congress cannot impair. (Boyd v. United States, 116 U.S., 616, 635; *In re* Debs, 158 U. S., at 594). The right of the United States to invoke the equity jurisdiction depends, *as a fundamental condition*

precedent, upon their having a sufficient interest in the controversy, and will fail whenever it appears that the wrong in question *is merely private*. (125 U. S., at 285, 286). To confer power upon the United States to redress such a private wrong by an equitable action is a denial of the right of trial by jury.

Neely v. Scott, 140 U. S., 106.

That the party injured may be engaged in interstate commerce, or in an occupation which concerns a commodity which is the subject of such commerce, does not change the wrong done him from a private to a public one, much less does it make it one which the Government can enjoin, for it has become established that the Act "gives no *new right* to bring a suit in equity," and that so far as *private injuries* are concerned, the exclusive remedy is by an action at law under Section 7.

Blindell v. Hagan, 54 Fed. Rep., 40, 41; affirmed, 56 Fed. Rep., 696;

Pidcock v. Harrington, 64 Fed. Rep., 821, 822;

Greer v. Stoller, 77 Fed. Rep., 1, 3.

c. Even where the right to sue exists, it is a decisive inquiry whether the granting of an injunction at the suit of the Attorney-General will *actually promote* the public interests. Unless such a result will clearly follow, the matter is left to be redressed at law or by criminal proceedings.

Morris etc. R. Co. v. Prudden, 20 N. J., Eq., 530, 536, 539.

Thus, although a floating grain elevator was so used as to constitute, strictly speaking, an obstruction to an important harbor, and, consequently, a technical public nuisance, an injunction sued for by the Attorney-General was denied in view of the fact that the instrumentality was largely used by shippers and therefore promotive and not restrictive of commerce. The wrong was "*more than balanced by the public benefits and the facilities rendered to commerce.*"

People v. Horton, 63 N. Y., 610, 617-618, 619-620;

Raritan Township v. Port Reading R. Co., 49 N. J. Eq., 11, 16.

"The injury to the public right must be of a *substantial* character and not a mere *theoretical wrong*."

Attorney-General v. Metropolitan R. Co., 125 Mass., 515, 516;

People v. Equity Gaslight Co., 141 N. Y., 232, 238;

1 High Injunctions, Sec. 765;

2 Beach, Injunctions, Sec. 1078.

d. There is, however, a further principle fatal to the right of the United States to be heard to litigate a controversy between Greer, Mills & Co. and the defending Exchange, or some one or more members thereof, and to restrain the commission of *merely private injuries.*

This principle has been well summarized by Judge DILLON: The public officer in question "must act in his official capacity, under a sense of official duty, and *not merely lend his name for the use of a private party. The proceeding must be official in fact and not in form only.* * * * *Public proceedings ought not to be used for the promotion of private ends.*"

2 Dill. Mun. Corp. (4th ed.), Sec. 899, n. 3.

No one can close his eyes to the fact that this proceeding is instigated and prosecuted by private interests. Indeed, the allegations of the bill and the name of the party verifying the same, of themselves, indicate as much, especially when considered in connection with Greer v. Stoller, 77 Fed. Rep., 1. And when it is noted that there are so many Exchanges throughout the land against which all the objections outlined in the pending bill are fully applicable, many of which, in influence upon commerce, volume of business done, number of members, drastic nature of rules, and other similar respects, completely overshadow the organization at bar,

and that none of them are assailed, though their incorporated character would enable the question to be tested expeditiously and at comparatively small expense, the inference becomes conclusive. The unofficial character of counsel who appeared at the hearing below, and who prepared the briefs for the government; and the proof which was made, not only puts this beyond question, but serves to bring the case fully within the characterization of a learned court:

"It appears to be instituted for that which we know is very often a stronger inducement for proceeding in this court than any pecuniary interest could afford, namely *to wreak out feelings of personal vengeance and anger.* That is the object of this suit, and the question is whether I am to permit the records of this court to be burdened with a suit which has no other object in the main than that. * * * I confess I cannot conceive anything *more improper than that.* * * * This suit is not a *bona fide* one, faithfully, truthfully and sincerely directed to the interests of the shareholders (public) whom the plaintiff claims the right to represent, and is *a mere mockery and an illusory proceeding* and must be treated as *an imposition on the court.*"

Robson v. Dodds, L. R., 8 Eq., 301, 307, 308;
Tuttle v. Church, 53 Fed. Rep., 422, 429.

This doctrine is fully applicable to actions prosecuted in the name of the law-officer of the public.

Thus, where the Attorney-General of England sought to enjoin a gas company from committing a public nuisance, and the court found that he had been induced to file the bill at the instigation of *a rival gas company*, Lord Justice KNIGHT BRUCE said: "Where the public interest purports to be asserted, it is not wholly immaterial, at least upon an interlocutory application, to look into the motives from which, or under which, the matter is brought forward. Now, in the present case, *though the Attorney-General's name is*

used, it is impossible not to see that the suit has been instituted *more for regard to private than to public good.*" (311, 312.) And Lord CRANWORTH added, at p. 313: "The case divides itself into two branches, in form. In substance, however, I cannot but come to the conclusion, that the Attorney-General and the public here are *a mere fiction* and that *the real parties concerned are only those that were parties in the former suit*," (which in the present case is Greer v. Stoller, 77 Fed. Rep., 1).

Attorney-General v. Sheffield Gas Co., 3 DeG., M. & G., 304.

This case was afterwards fully affirmed.

Attorney-General v. Cambridge Gas Co., L. R., 4 Ch. App., 71, 83, 84.

In United States v. San Jacinto Tin Co., 125 U. S., 273, 286, Mr. Justice MILLER declared that, although the bill had been officially brought by the Attorney-General and bore his signature, "if the fact becomes manifest that the suit *has actually been brought for the benefit of some third person*, * * * the suit must fail."

Considerations of this character are entitled to especial force where, as here, the parties seeking to wreak their malice, to vindicate their rights, or to be protected against wrong-doing, as the case may be, are at full liberty to sue in their own names. They are citizens of Illinois, so that they can sue in the Federal courts of Kansas and Missouri, as well as in the State courts. Indeed, it appears from the record that they now have such a suit pending in Wyandotte county, Kansas, and that they have previously sued in the District court of that county, in the State Circuit court at Kansas City, Missouri, and in the Federal court for the Western District of Missouri. If they constitute an agency of interstate commerce, as the bill claims, they can sue in the Federal court without regard to citizenship, (Toledo etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep., 730),—

of course, assuming responsibility for costs, and, if a temporary injunction should be awarded, liability for damages if ultimately unsuccessful.

Consequently, the element of private wrong—of a cause of action for maliciously injuring another without a just cause or excuse—is not within the allegations of the present bill nor subject to be made the basis of any relief in a suit instituted by the Attorney-General, even if proved.

Findlay v. McAllister, 113 U. S., 104, 110, 111.

XII.

Rules Governing the Granting of a Temporary Injunction.

This cause was heard on an application for a temporary injunction, based on the bill, answer, replication, and volumnious affidavits, *pro* and *con*.

In considering these affidavits, the mass of incompetent matter with which those filed by the complainants' so plenteously abound—hearsay, conclusions, and statements which have no basis in the pleadings—must of course be disregarded. Such statements are not made competent because embodied in *affidavits*. Self-evidently, "the same rule must be applied to distinguish between testimony that is admissible and testimony that is non-evidential, whether such testimony is found in affidavits to be used as a ground for obtaining an injunction or is produced in open court by the examination of witnesses to support a litigated fact."

Thompson v. Ocean City R. Co., 37 Atl. Rep., 129, 130, (N. J. Eq., 1897);

Bennett v. Congdon, 50 Pac. Rep., 556, (Mont., 1897).

It will be observed that the injunction under review was not designed to preserve the *status quo*, but that it is *mandatory in form* and if permitted to take

effect, by an affirmance here, it will operate to destroy the defending Exchange and in all other respects subject it to the disastrous consequences of an ultimate adverse *final decree*.

The circumstances are such that if any doubt is entertained as to the literal truth of the defendants' showing of facts, that doubt must be liberally solved in their favor.

1 Beach, Injunctions, Sec. 137.

Unless this course is pursued, irreparable injury may be done the defendants. So, too, if they are to be denied, the privilege of sifting the facts outlined in the complainants' *ex parte* affidavits by cross-examination and of meeting the rebuttal affidavits (which were disclosed for the first time at the hearing), before the *status quo* is interfered with, the result will be to characterize the action of the circuit court in awarding an interlocutory order, under the circumstances of this case, as not only an abuse of judicial discretion, but as contrary to established landmarks of the law.

United States v. World's Columbian Exposition, 56 Fed. Rep., 654;

Hagen v. Beth, 50 Pac. Rep., 425, (Cali., 1897).

The principles which should have been followed below, and in the light of which we believe that this Court, in fairness to the defendants, will draw its deductions as to the facts of this case, are these:

1. The rules and course of business of the defendants are not of recent origin. They have prevailed in substantially the same form for over ten years. A vast business has been built up as a result thereof, and all interests have adjusted themselves to the methods and usages thereby prescribed. Memberships worth $750,000 are involved. A temporary injunction will not only destroy the value of these certificates, but will do so in such a manner that it can never be recovered. That is to say, a preliminary injunction will necessarily dissolve the organization beyond the power of reorgani-

zation. In the meantime, the competing Exchanges at Chicago, St. Louis, Omaha, Fort Worth and other points will have attracted the business, and the much vaunted Kansas City market will be a thing of the past. And if, for any reason, it should be hereafter held that the defendants were not engaged in interstate commerce, or that the rules of the Exchange were not condemned by the Act of 1890, the defendants will be wholly remediless. The United States having given no bond, no damages can be recovered. The amount of public and private mischief caused by the preliminary injunction will be incalculable, and, unfortunately, the private loss will fall most heavily on men of exceedingly limited means. These rules were laid down in a case decided under the statute in question.

U. S. v. Jellico etc. Coal Co., 43 Fed. Rep., 898.

2. It is fundamental in equity jurisprudence that a temporary injunction is not a matter of right. The court never exercises its discretion unless certain elements concur. It is not enough that the court may believe that on final hearing the complainant will probably recover; nor, indeed, that it believes that *the whole case can as well be decided on the preliminary hearing.*

Akin v. Davis, 14 Kas., 143, 147;

Gold etc. Tel. Co. v. Commercial Tel. Co., 22 Fed. Rep., 838;

Gray v. Manhattan Ry. Co., 128 N. Y., 499, 509.

Where the complainant makes a *prima facie* case, so as to speak, on the law and the facts, the court oftentimes grants a preliminary injunction; but this jurisdiction is limited to instances where "the case is one of *urgent necessity* and when *irreparable injury* is threatened."

City of Newton v. Levis, 79 Fed. Rep., 715, 718, (C. C. A.);

West Jersey R. Co., v. Cape May etc. R. Co., 34 N. J. Eq., 164, 166;

Stoddart v. Vanlandingham, 14 Kas., 18, 36;

Zinsser v. Cooledge, 17 Fed. Rep., 538;
Kilburn v. Ingersoll, 67 Fed. Rep., 46, 49.

"In balancing the comparative convenience or inconvenience from granting or withholding an injunction, the Court will take into consideration what means it has of putting the party who may be ultimately successful *in the position he would have stood if his legal rights had not been interfered with.*"

Russell v. Farley, 105 U. S., 433, 438, 439.

"Otherwise, a defendant might be *unnecessarily and improperly restrained from doing that which he has a right to do* and through such restraint suffer an injury for which *no adequate compensation is afforded.*"

Conley v. Fleming, 14 Kas., 381, 385;
Rigby v. Great Western Ry. Co., 2 Phill. Ch., 44, 50;
Shrewsbury etc. R. Co. v. Shrewsbury etc. R. Co., 1 Sim., N. S., 410, 432;
Dyke v. Taylor, 3 DeG., F. & J., 467, 472, 473;
Fieldman v. Lancashire etc. Ry. Co., 2 DeG. & Sm., 531, 536, 537.

3. These considerations are especially weighty where the proposed temporary injunction is *mandatory* in form and will practically operate as a *final decree.* Even if cases may arise in which the exigency is so clamorous as to justify the issuance of such an order, a court will always be exceedingly careful to avoid "the possibility or likelihood of the awkward predicament of having silenced" a business which may ultimately be adjudged to be perfectly lawful.

Elwes v. Payne, 12 Ch. Div., 468, 477;
Hilton v. Earl of Granville, 1 Cr. & Ph., 283, 297, 298;
Attorney-General v. Mayor of Liverpool, 1 Myl. & Cr., 171, 205, 212;
Greenhalgh v. Manchester etc. Ry. Co., 3 Myl. & Cr., 798, 799.

4. For the purpose of applying these rules to the present case, it is to be remembered:

a. All the reported cases concerning Commercial Exchanges strongly adjudge their merit as promoters of trade and the lawfulness of their rules. No one has hitherto supposed that Congress in 1890 had transformed them into unlawful organizations. The question is not only new, as was conceded by the circuit court, but the defendants' view of it, if not palpably unanswerable, is, at least, supported by weighty argument and by authorities of so much force and respectability that ordinarily they would be unhesitatingly adopted. Certainly, the question is one "of much practical importance in the present state of legislation on the subject," a consideration of decisive influence in determining the exercise of discretion in such a case as this.

Smith v. Reading City Pass. Ry. Co., 156 Pa. St., 5, 8.

b. Not only is the construction of the statute insisted on by the complainant of doubtful correctness, but jurisdiction of the court—the applicability of the statute,—depends upon a question largely of fact: Does the occupation of the defendants consist of (1), *interstate* transactions, and (2), if so, is that occupation "commerce" in the sense of the Constitution? In such a case, a temporary injunction should be refused, even though the Attorney-General be the applicant therefor.

Attorney-General v. North Jersey St. Ry. Co., 54 N. J. Eq., 263.

5. The operations of the Exchange have done and are doing no harm to the public. The right asserted by the complainant is, at best, a mere technical one. The commissions prescribed are proved to be reasonable, and they are the same as those which prevail elsewhere. To destroy this Exchange, leaving all others in existence, will simply increase the shipments to competing markets. If the others, in turn, are likewise to be sub-

jected to dissolution by a temporary injunction (or indeed on a final hearing), it will cause interminable confusion and commercial chaos, and bring about the very condition of *suave qui peut* which has been recognized, in all countries and in all ages, as fatal to the prosperity of a trade. Weighing the balance of comparative convenience and injury, the preponderance is greatly on the side of the defendants.

So it was concluded where the operation of a branch railroad was sought to be enjoined (Torrey v. Camden etc. R. Co., 18 N. J. Eq., 293, 297); and, also, where the injunction "may operate to injuriously interrupt an important enterprise" (Wing v. Fairhaven, 8 Cush, 363), or to "compel the defendant to abandon a fundamental principle upon which it now conducts its business" (Seymour v. Mutual Reserve Life Asso., 14 Misc. N. Y. Rep., 151, 155), or to prevent a street railway company from changing its motive power to electricity. (Fritz v. Erie City Ry. Co., 155 Pa. St., 472, 473; Myers v. Duluth Ry. Co., 53 Minn., 335, 337). See, also,

Swift v. Jenks, 19 Fed. Rep., 641, 643;

Tuttle v. Church, 53 Fed. Rep., 422, 428;

U. S. v. La Compagnie Francaise, 77 Fed. Rep., 495.

6. Even when the Courts do not peremptorily strike from the docket a case in which the use of the name of the public appears to be merely illusory and at the instigation of a private interest, the element is regarded *as fatal to an application for an interlocutory injunction. On this hearing the motives* which induced the litigation are of decisive influence.

Atty.-General v. Sheffield Gas Co., 3 DeG., M. & G., 304, 311, 313;

Atty.-General v. Cambridge Gas Co., L. R., 4 Ch. App., 71, 83-84.

"A court of equity does not look with favor upon a suit brought merely for the purposes and at the instigation of another."

Tuttle v. Church, 53 Fed. Rep., 422, 429.

7. When it had been determined to dispose of the case, in the same manner as if it had stood on final hearing, any dispute in the facts should have been determined in favor of the defendants, not only in fairness and to avoid the possibility of an irreparable injury to them by an interlocutory injunction based on a state of facts which may turn out to be wholly or substantially untrue, when the testimony is taken in the regular way and considered on final hearing, but also because the showing of the defendants accords with the facts as conceded or as found in the many investigations which have been made into the aims, purposes, operations, and rules of Exchanges generally.

Connell Mfg. Co. v. Wattles, 49 N. J. Eq., 92, 97.

8. However, it is confidently submitted that a dispassionate consideration of this Record will induce the conclusion that the complainant is wholly without a cause of action.

The appellants, therefore, invoking the now established rule of practice in such cases, pray that the order appealed from may be reversed, and the bill dismissed.

Smith v. Vulcan Iron Works, 165 U. S., 418.

Respectfully submitted,

L. C. KRAUTHOFF,

Of Counsel for Appellants.

Kansas City, Mo., January 15, 1898.